RECORD, CASE No. 13,665.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 111.

W. P. CLEMENT, M. B. CLEMENT, AND CHARLES EUSTIS, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF CLEMENT, EUSTIS & COMPANY, PLAINTIFFS IN ERROR,

vs.

J. A. FIELD AND ALEXANDER MAGEE, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF J. A. FIELD & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 In the District Court of the 20th Judicial District of the State of Kansas, Sitting in and for the County of Rice.

CLEMENT AND EUSTIS & Co., Plaintiffs,
vs.
J. A. FIELD & Co., Defendants.

Be it remembered that on the 10th day of August, A. D. 1885, came the plaintiff- and filed their petition, which is in words and figures as follows, to wit:

In the District Court of Rice County, State of Kansas.

W. P. CLEMENT and M. B. CLEMENT and CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of Clement and Eustis and Company, Plaintiffs,
vs.
J. A. FIELD and ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants.
} Petition.

Comes now the plaintiffs, W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name and style of Clement, Eustis & Co., and for their cause of action against the defendants, J. A. Field and Alex. Magee, partners doing business under the firm name and style of J. A. Field & Co., and for their cause of action against the defendants allege and state—

That on and before the 22nd day of June, 1883, the plaintiffs were engaged in the raising of sorghum cane and the manufacture of sugar and molasses from such cane near the city of Sterling, Rice county, State of Kansas, and the defendants were en-
2 gaged in the manufacture of mills for the purpose of manufacturing sugar and molasses from such sorghum cane in the city of St. Louis, State of Missouri.

That on or about said date the plaintiffs contracted with and employed the said defendants to manufacture for them a certain No. 7 Star cane mill, the main roller to be 24 inches and the lower roller 20 inches in diameter and three feet long, including bagasse carrier 16 feet long, complete; reels, drawing chain, and fifty feet of carrier webb, with friction rollers, for a fifty-feet cane-carrier, gearing to give speed for of 25 feet per minute to cane traveling through rollers, engine making 100 revolutions per minute, with double back gearing suitable to attach direct to engine shaft, to be delivered on board the cars in the city of St. Louis, State of Missouri, on or before the first day of August, 1883, for which plaintiffs agreed to pay to said defendants for said mill eighteen hundred and fifty ($1,850) dollars; five hundred dollars cash in hand, five hundred dollars due Nov. 1st, 1883, and eight hundred and fifty due Nov. 1st, 1884, with six per cent. interest per annum on the last deferred payment from the date of the shipment of said mill from said city

of St. Louis, Mo., which said deferred payments were secured by the promissory notes given by said plaintiffs to said defendants, secured by chattel mortgage on said mill.

Plaintiff- further avers that the said defendants, at the time of the sale of the said mill and as a part of the contract therefor, then and there falsely and fraudulently warranted said mill would do as good work as any mill for a similar purpose, and that it would crush and express the juice as thoroughly from the cane as any other
3 mill of the same size and price, and to be of good material and well made, and to do as good work and as much of it as any mill of any other manufactory, and to be as strong as any other mill of the same size, and that it would be as good a mill as any mill made, and that said defendants would stand by and make said mill good in all respects as warranted, and that upon failure of said mill to perform as warranted, upon notice, the said defendants would make it operate and perform in accordance with said warranty; and, failing so to do, the said defendants would, at their own costs and expense, replace said mill with a new one that would perform as warranted, or that they would refund the purchase-money.

The plaintiffs further aver that they did and performed all and singular the conditions of said contract on their part; that they paid said defendants five hundred dollars, the cash payment on said mill, and executed and delivered the notes secured by the mortgage thereon, as by them in their said contract they, the said plaintiffs, obligated themselves to do and perform.

Plaintiffs further aver that said defendants failed, neglected, and refused to perform their said contract in this—

That they did not manufacture and ship said mill on the cars at the city of St. Louis, State of Missouri, on or before the 1st day of August, 1883, as they by their said contract bound themselves to do, but, on the contrary and in breach of their said contract, did not place said mill and appurtenances upon the cars or ship said mill from the city of St. Louis until the 15th day of August, 1883, thereby depriving the plaintiffs from the use of said mill for a period of fifteen days.

Plaintiffs further aver that said defendants failed, neglected, and refused to perform their said contract, but made breach
4 thereof and of their said warranties therein contained, in this:

That said mill did not do as good work as any other mill for similar purposes, but wholly failed to perform the purpose for which said plaintiffs bought said mill and the defendants sold the same to plaintiffs, nor did said mill crush and express the juice as thoroughly as any other mill of the same size and price; but, on the contrary, it failed to crush the cane or express the juice therefrom, but left over fifty per cent. of the juice unexpressed therefrom, which ought and could have been expressed from such cane if said mill had performed as it ought to have done and was warranted by the said defendants in their contract to do.

Nor was said mill constructed of good material or well made, nor did said mill do as good work or as much of it as any mill of any

[illegible]; but, on the contrary, it failed to do good work both in quantity and in quality; nor was said mill as strong as any other mill of the same size, but, on the contrary, the same was weak and unfit for the use for which plaintiffs bought and the defendants sold the same to them; nor was said mill as good as any other made, but, on the contrary, it was entirely worthless and of no value whatever, and that said defendants did not make said mill good as they had by their said contract obligated themselves to do; but, on the contrary, notwithstanding the failure of said mill as warranted by said defendants as aforesaid, they neglected and refused to make said mill operate and perform in accordance with their said warranty, and neglected and refused to replace said mill with a new one at their own cost and expense that would perform as warranted by them, though notified of such failures and often requested so to do; nor have said defendants refunded said
5 purchase-money paid them on said mill by said plaintiffs, though often requested so to do, and that said defendants at the time of the failures of said mill and the breach of the said contract and warranty had full knowledge thereof.

Plaintiffs further aver that said defendants, by means of the premises aforesaid, falsely and fraudulently deceived them, the said plaintiffs, in the sale of said mill and the making of said contract as aforesaid, by means whereof the said plaintiff-, confiding in said false and fraudulent misrepresentations and warranties, took possession of, used, and operated and employed said mill for the purpose of manufacturing sugar, syrup, and molasses during the season of 1883 at their works at the city of Sterling as aforesaid, and that said mill, from its being so defectively and unmechanically made and constructed as aforesaid, broke and failed to perform the uses for which defendants sold it to said plaintiffs, and thereby the plaintiff- incurred great loss and expense in and about the repairs on said mill to induce it to operate, "to wit," three hundred dollars.

And the said mill not having been manufactured and shipped on the cars at St. Louis, Mo., on the first day of August, 1883, as contracted by the defendants as aforesaid, in consequence thereof the plaintiffs were deprived of the use of said mill for the period of fifteen days, thereby greatly delaying the plaintiff in operating said mill and in manufacturing their sugar and molasses and who were accordingly deprived of divers large profits and gains of over fifteen hundred dollars which they otherwise would have made from the earnings of said mill, and also thereby said plaintiffs were forced to and did lay out and expend large sums of money, "to wit," five hundred dollars, in and about making repairs to said mill in procuring it to operate and perform the uses and purposes for which the same was sold by defendants and purchased by
6 said plaintiffs, and thereby plaintiffs were greatly delayed and hindered in operating said mill and manufacturing sugar and molasses; in consequence thereof suffered great loss and were deprived of divers large profits and gains which they would have realized from the [illegible] of said mill, to wit two thousand dollars, if the [illegible] had as contracted [illegible]

warranted to do by said defendants; and also thereby said plaintiffs suffered divers great losses and were deprived of divers large profits and gains, to wit, four thousand dollars, because of its failure to perform and to express the juice from the cane as it ought to have done, and was falsely represented and warranted to do by defendants; and also thereby the plaintiffs, relying upon the contract and warranty of said defendants, employed hands, teams, and appliances in and around their works, and plaintiffs were obliged to pay therefor, during the time the said mill was failed to be delivered as aforesaid and was unemployed in consequence of its failures, for wages, board, and *c.&* — of over two thousand dollars, and also thereby in consequence of the non-delivery and failure of said mill the plaintiffs were unable to manufacture and lost 300 acres of sorghum cane of the value of three thousand dollars, which they otherwise could have and would have manufactured if said mill had been delivered and performed as contracted and warranted by said defendants, and that said plaintiffs, in consequence of the failure of said defendants to deliver said mill at the time and the failure of said mill to perform in accordance with the contract and warranty of said defendants as aforesaid, plaintiffs were compelled to and did employ extra help and machinery in and about manufacturing their said cane, for which they were compelled to and did pay five hundred dollars, and thereby the plaintiff sustained other losses and damages and were deprived of divers other large profits and gain- which they otherwise would have made from the earn-
7 ings of said mill, all and singular in the aggregate of ten thousand dollars.

For which plaintiffs ask judgment, costs, and other relief.

CLEMENT, EUSTIS & CO.,
By JETMORE & SON,
Their Attorneys.

$15.00. AUGUST 10TH, 1885.

Received of W. P. Clement fifteen dollars as security for costs.
S. J. SMITH, *Clerk.*

Indorsement: No. 881. Rice Co. dist. court. Clement, Eustis & Co., pl'ffs, *vs.* J. A. Field & Co., def'ts. Petition. Filed August 10th, 1885. S. J. Smith, clerk. Jetmore & Son, attorneys for plaintiffs.

And said plaintiffs also on said 10th day of August, 1885, filed an affidavit for publication, which is in words and figures as follows, "to wit:"

In the District Court of Rice County, State of Kansas.

W. P. CLEMENT, M. B. CLEMENT, and CHAS. EUSTIS, Partners Doing Business under the Firm Name and Style of Clement, Eustis & Co., Plaintiffs,
vs.
J. A. FIELD and ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants.
} Affidavit for Publication.

STATE OF KANSAS, *Rice County,* } ss:

Comes now W. P. Clement, who, being duly sworn, upon oath says that he is one of the plaintiffs in above-entitled action and a member of the firm of Clement, Eustis & Co., and authorized to make this affidavit herein.

That said action is brought by said plaintiffs against the said defendants, the said firm of J. A. Field and Alex. Magee, partners doing business under the firm name and style of J. A. Field & Co., each of whom are non-residents of the State of Kansas, having in said county and State property and effects and debts owing to them which are sought to be taken by said plaintiffs in said action by attachment, as by statute of said State in such cases provided, and that service of summons cannot be made within said State on said defendants or either of them.

W. P. CLEMENT.

Personally appeared before me, the undersigned, W. P. Clement, who, upon oath, being duly sworn, deposes and says that he has read the above and foregoing affidavit, and that the facts therein stated are true.

W. P. CLEMENT.

Subscribed and sworn to before me this 10th day of August, 1885.
[SEAL.] S. J. SMITH, *Clerk D. C.*

Indorsed: No. 881. Rice county dist. court. Clement & Eustis & Co., pl'ffs, *vs.* J. A. Field & Co., def'ts. Affidavit for publication. Filed August 10th, 1885. S. J. Smith, clerk. Jetmore & Son, attorneys for plaintiffs.

And said plaintiffs on said 10th day of August, 1885, filed an affidavit for attachment in words and figures as follows, "to wit:"

In the District Court of Rice County, State of Kansas.

W. P. CLEMENT, M. B. CLEMENT, and CHAS. EUSTIS, Partners Doing Business under the Firm Name and Style of Clement, Eustis & Co., Plaintiffs,
9 *vs.*
J. A. FIELD, ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants.

Affidavit for Publication.

STATE OF KANSAS, *Rice County,* } *ss:*

Comes now W. P. Clement, who, upon oath, being duly sworn, says that he is one of the plaintiffs and a member of the firm of Clement, Eustis & Co. and authorized to make this affidavit herein.

That said plaintiffs have commenced their action in the dist. court of said county for the recovery of ten thousand dollars against said defendants in above-entitled action.

That the said defendants are indebted and each of them to said plaintiffs in said sum of ten thousand dollars for damages sustained by plaintiffs against said defendants and each of them, for that said defendants heretofore, " to wit : "

That on and before the 23rd day of June, 1883, the plaintiffs were engaged in the raising of sorghum cane and the manufacture of sugar and molasses from such cane near the city of Sterling, Rice county, Kansas, and the defendants were engaged in the manufacture of mills for the purpose of manufacturing sugar and molasses from such sorghum cane in the city of St. Louis, State of Missouri.

That on or about said date the plaintiffs contracted with and employed the said defendants to manufacture for them a certain No. 7 Star cane mill, the main roller to be 24 inches and the lower roller 20 inches in diameter and three feet long, including bagasee carrier, 16 feet long; reels, drawing chain, and fifty feet of carrier web, with friction rollers for a fifty-feet cane-carrier; gearing to give speed for of 25 feet per minute to cane travelling through rollers, engine making 100 revolutions per minute, with double-back gearing to at-
10 tach direct to engine shaft, to be delivered on board the cars in the city of St. Louis, State of Missouri, on or before the first day of August, 1883, for which plaintiffs agreed to pay to said defendants for said mill eighteen hundred and fifty ($1,850) dollars, five hundred dollars cash in hand, five hundred dollars due Nov. 1st, 1883, and eight hundred and fifty due Nov. 1st, 1884, with six per cent. interest per annum on the last deferred payment from the date of the shipment of said mill from said city of St. Louis, Mo., which said deferred payments were secured by the promissory notes given by said plaintiff to said defendants, secured by chattel mortgage on said mill.

Plaintiff further avers that the said defendants, at the time f the sale of the said mill and as a part of the contract therefor, then and there falsely and fraudulently warranted said mill would do

as good work as any mill for a similar purpose, and that it would crush and express the juice as thoroughly from the cane as any other mill of the same size and price and to be of good material and well made and to do as good work and as much of it as any mill of any other manufactory and to be as strong as any other mill of the same size and that it would be as good a mill as any mill made, and that said defendants would stand by and make said mill good in all respects as warranted, and that upon failure of said mill to perform, as warranted, upon notice, the said defendants would make it operate and perform in accordance with said warranty, and failing so to do the said defendants would at their own costs and expense replace said mill with a new one that would perform as warranted or that they would refund the purchase-money.

The plaintiffs further aver that they did and performed all and singular the conditions of said contract on their part; that they paid said defendants five hundred dollars, the cash payment
11 on said mill, and executed and delivered the notes secured by the mortgage thereon, as by them in their said contract they, the said plaintiffs, obligated themselves to do and perform.

Plaintiffs further aver that said defendants failed, neglected, and refused to perform their said contract in this, that they did not manufacture and ship said mill on the cars at the city of St. Louis, State of Missouri, on or before this 1st day of August, 1883, as they by their said contract bound themselves to do; but, on the contrary, and in breach of their said contract did not place said mill and appurtenances upon the cars or ship said mill from the city of St. Louis until the 15th day of August, 1883, thereby depriving this plaintiff *from* the use of said mill for a period of fifteen days.

Plaintiffs further aver that said defendants failed, neglected, and refused to perform their said contract, but made breach thereof and of their said warranties therein contained in this:

That said mill did not do as good work as any other mill for similar purpose for which said plaintiffs bought said mill and the defendants sold the same to plaintiffs; nor did said mill crush and express the juice as thoroughly as any other mill of the same size and price; but, on the contrary, it failed to crush the cane or express the juice therefrom, but left over fifty per cent. of the juice unexpressed therefrom, which ought and could have been expressed from such cane if said mill had performed as it ought to have done and was warranted by the said defendants in their said contract to do; nor was said mill constructed of good material or well made, nor did said mill do as good work or as much of it as any mill of any other manufacture; but, on the contrary, it failed to do good work both in quantity and in quality; nor was said mill as strong as any other mill of the same size; but, on the contrary, the same was
12 weak and unfit for the use for which plaintiffs bought and the defendants sold the same to them.

Nor was said mill as good as any other made, but, on the contrary, it was entirely worthless and of no value whatever, and that said defendants did not make said mill good, as they had by their said contract obligated themselves to do, but, on the contrary, not-

withstanding the failure of said mill as warranted by said defendants as aforesaid, they neglected and refused to make said mill operate and perform in accordance with their said warranty, and neglected and refused to replace said mill with a new one, at their own costs and expense, that would perform as warranted by them, though notified of such failure and often requested so to do; nor have said defendants refunded said purchase-money paid them on said mill by said plaintiffs, though often requested so to do, and that said defendants at the time of the failure of said mill and the breach of the said contract and warranty had full knowledge thereof.

Plaintiffs further aver that said defendants, by means of the premises aforesaid, falsely and fraudulently deceived them, the said plaintiffs, in the sale of said mill and the making of said contract as aforesaid, by means whereof the said plaintiff-, confiding in said false and fraudulent misrepresentations and warranties, took possession of, used, and operated and employed said mill for the purpose of manufacturing sugar, syrup, and molasses during the season of 1883 at their works, at the city of Sterling as aforesaid, and that said mill, from its being so defectively and unmechanically made and constructed as aforesaid, broke and failed to perform the uses for which defendants sold it to said plaintiffs, and thereby the plaintiffs incurred great loss and expense in and about the re-
13 pairs on said mill to induce it to operate, "to wit," three hundred dollars.

And the said mill not having been manufactured and shipped on the cars at St. Louis, Mo., on the first day of August, 1883, as contracted by the defendants as aforesaid, in consequence thereof the plaintiffs were deprived of the use of said mill for the period of fifteen days, thereby greatly delaying the plaintiffs in operating said mill and in manufacturing their sugar and molasses, and who were accordingly deprived of divers large profits and gains of over fifteen hundred dollars, which they otherwise would have made from the earnings of said mill, and also thereby said plaintiffs were forced to and did lay out and expend large sums of money, "to wit," five hundred dollars, in and about making repairs to said mill, in procuring it to operate and perform the uses and purposes for which the same was sold by defendants and purchased by said plaintiffs, and thereby plaintiffs were greatly delayed and hindered in operating said mill and manufacturing sugar and molasses; in consequence thereof suffered great loss and were deprived of divers large profits and gains which they would have realized from the earnings of said mill, to wit, two thousand dollars, if the same had performed as contracted and warranted to do by said defendants, and also thereby said plaintiffs suffered divers great losses and were deprived of divers large profits and gains, to wit, four thousand dollars, because of its failure to perform and to express the juice from the cane as it ought to have done and was falsely represented and warranted to do by defendants.

And also thereby the plaintiffs, relying upon the contract and warranty of said defendants, employed hands, teams, and appli-

ances in and around their works, and plaintiffs were obliged to pay therefor during the time the said mill was failed to be de-
14 livered as aforesaid and was unemployed in consequence of its failures for wages, board, and C. & *of* over two thousand dollars, and also thereby in consequence of the non-delivery and failure of said mill the plaintiffs were unable to manufacture and lost 300 acres of sorghum cane, of the value of three thousand dollars, which they otherwise could have and would have manufactured if said mill had been delivered and performed as contracted and warranted by said defendants, and that said plaintiffs, in consideration of the failure of said defendants to deliver said mill at the time and the failure of said mill to perform in accordance with the contract and warranty of said defendants as aforesaid, plaintiffs were compelled to and did employ extra help and machinery in and about manufacturing said cane, for which they were compelled to and did pay five hundred dollars, and thereby the plaintiffs sustained divers other losses and damages and were deprived of divers other large profits and gain, which they otherwise would have made from the earnings of said mill all and singular in the aggregate of $10,000.00.

That said claim is just, is due, and wholly unpaid.

That said affiant believes that said plaintiffs ought to recover of said defendants in said action the said ten thousand dollars.

That said defendants and each of them are non-residents of the State of Kansas.

W. P. CLEMENT.

Personally appeared before me the undersigned, clerk dist. court in and for said county of Rice and State of Kansas, the undersigned, W. P. Clement, who, upon oath, being duly sworn, deposes and says that he has read the above and foregoing affidavit and that the facts therein stated are true.

W. P. CLEMENT.

15 Subscribed and sworn to before me this 10th day of August, 1885.

[SEAL.] S. J. SMITH, *Clerk D. C.*

Indorsed: No. 881. Rice county dist. court. Clement, Eustis & Co., pl'ffs, *vs.* J. A. Field & Co., def't-. Affidavit for attachment. Filed August 10th, 1885. S. J. Smith, clerk.

And said plaintiffs filed a precipe for summons and attachment; which said precipe is in the words and figures as follows, to wit:

STATE OF KANSAS, } ss:
Rice County, }

In the District Court.

CLEMENT, EUSTIS & Co., Plaintiffs, } Præcipe for Summons. An Attachment.
vs.
J. A. FIELD & Co., Defendants. }

The clerk of said court will issue summons and attachment in the above action to the sheriff of Rice county, returnable August 19th. Amount claimed, $10,000.00.

A. B. JETMORE & SON,
Attorney- for Pl'ffs.

Indorsed: No. 881. District court, Rice county. Clement, Eustis & Co., plaintiffs, *vs.* J. A. Field & Co., defendant-. Præcipe. Filed August 10th, 1885. S. J. Smith, clerk.

Whereupon, on said 10th day of August, A. D. 1885, a summons was issued out of said district court by the clerk thereof, and said summons was in words and figures as follows, to wit:

STATE OF KANSAS, } ss:
Rice County, }

The State of Kansas to the sheriff of Rice county, Greeting:

You are hereby commanded to notify J. K. Maybury, agent of J. A. Field & Co., that they have been sued in the district court
16 within and for the county of Rice, in the 20th judicial district of the State of Kansas, and must answer the petition filed by the plaintiffs, W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name and style of Clement, Eustis & Co., on or before the 8th day of September, 1885, or the said petition will be taken as true and judgment rendered accordingly; and return this writ on the 19th day of August, A. D. 1885.

In witness whereof I have hereunto signed my name and
[SEAL.] affixed the seal of said court, at my office, in Lyons, in said county, this 10th day of August, A. D. 1885.

S. J. SMITH,
Clerk of the District Court.

And on said summons is the following endorsement, to wit:
If the defendants fail to answer, the plaintiffs will take judgment for $10,000.00 and cost of suit.

S. J. SMITH, *Clerk.*

And on the 11th day of August, 1885, the said summons was duly returned and filed, with the following return thereon, to wit:
Received this writ this 10th day of August, 1885, at 10 o'clock a. m. August 10th, 1885, served the same by delivering a copy

thereof, with the endorsement thereon duly certified, to the within-named J. K. Maybury.

J. T. GODFREY, *Sheriff.*

And on the 10th day of August, 1885, an attachment order was issued; which said order of attachment was in words and figures as follows, to wit:

THE STATE OF KANSAS, }
20th Judicial District. }

CLEMENT, EUSTIS & CO., Pl'ffs, }
vs. }
J. A. FIELD & CO., Def'ts. }

17 District Court for the 20th Judicial District in and for Rice County, Kansas.

The State of Kansas to the sheriff of Rice county, Greeting:

You are hereby commanded to attach and safely keep the lands, tenements, goods, chattels, stocks, interest in stocks, rights, credits, moneys, and effects of the defendant- not exempt by law from being applied to the payment of the claims of said plaintiff, or so much thereof as will satisfy their claim for $10,000.00 *dollars* and fifty dollars, the probable costs of this action. You will make due return of this order on the 19th day of August, A. D. 1885, nine days after date.

Witness my hand and the seal of said court affixed at my office, in the city of Lyons, this 10th day of August, A. D. 1885.

S. J. SMITH, *Clerk.*

On the 11th day of August said order of attachment was duly returned and filed in said court, with the following return endorsed thereon, to wit:

Received this order August 10th, 1885. August 10th, 1885, I executed the same by going to the place where the property of the within-named defendant, J. A. Field & Co., described in the inventory and appraisement hereunto annexed was found, and there at 4 o'clock p. m. of said day, in the presence and hearing of J. A. Porter and John Hirth, two credible persons, declared that by virtue of said order I attached said property at the suit of the within-named plaintiffs, and with J. A. Porter and John Hirth, two householders of the county, who were by me first duly sworn, did make a true inventory and appraisement of all said property attached, which inventory and appraisement was by me and said householders signed, and is hereunto annexed and returned with said order. I delivered a copy of this order, duly certified,
18 to J. K. Maybury, agent of defendants.

J. T. GODFREY, *Sheriff.*

Said inventory and appraisement so attached to said return is in words and figures as follows, to wit:

STATE OF KANSAS, } ss:
Rice County, }

In the District Court of the 20th Judicial District of the State of Kansas, Sitting within and for Rice County, in said State.

CLEMENT, EUSTIS & Co., Pl'ffs, }
vs.
J. A. FIELD & Co., Def'ts. }

We, J. A. Porter and John Hirth, disinterested householders residing in Rice county, State of Kansas, having been by J. T. Godfrey, sheriff of said county of Rice, duly summoned to appraise the property of J. A. Field & Co. in this cause, after first being sworn, do return that upon actual view of said premises and after having been on said premises we find and estimate the same to be of the total value and appraisement of two hundred dollars, the said property being described and separately appraised as follows, to wit, 1 No. 7 Star cane mill, back-gear bagasse carrier complete, cane-carrier chain, slats, gearing, pullies, shifting and casting for cane-carrier.

J. A. PORTER. [SEAL.]
JOHN HIRTH. [SEAL.]

Dated August 10th, A. D. 1885.

STATE OF KANSAS, } ss:
Rice County, }

I do hereby certify that the above-named J. A. Porter and John Hirth are disinterested householders, residents of Rice county, in said State, and were by me duly summoned and sworn impartially to appraise the within-described property upon actual view thereof, this the 10th day of August, A. D. 1885.

J. T. GODFREY, *Sheriff.*

19 And on the 31st day of August, A. D. 1885, the defendants herein presented their answer to the petition of the plaintiffs; which said answer was duly received and filed on said 31st day of August, 1885, and is in words and figures as follows, to wit:

STATE OF KANSAS, } ss:
County of Rice, }

In the District Court within and for the County and State Aforesaid.

W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of Clement, Eustis & Co., Plaintiffs,
vs.
J. A. FIELD and ALEXANDER MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants. } Answer.

And now come the said defendants and for answer to the petition of said plaintiffs filed herein say:

1st. That they deny each and every, all and singular, the allegations and averments in said petition contained and set forth.

2nd. That if it was agreed, as stated in said petition, that said mill and appliances should be manufactured and shipped on the cars in the city of St. Louis on the 1st day of August, 1883, it was also agreed by the said plaintiffs at said time, to wit, June the 22nd, 1883, that said plaintiffs would then pay said defendants the sum of $500.00, the same being the $500.00 cash payment mentioned in said petition, and the defendants aver that said plaintiffs did not, then or for more than thirty days thereafter, pay said defendants
20 said $500.00, but, on the contrary, neglected and refused so to do, and that said defendants were under no obligation to and could not and did not commence the manufacture of said mill and appliances until after the payment of said $500.00, and that when said $500.00 was paid they manufactured said mill and appliances and shipped the same on the cars at the city of St. Louis as soon thereafter as the same could be done with all possible diligence on their part, and that if the shipment of said mill and appliances was delayed fifteen days or any time after the first day of August the same was caused by reason of the fault and negligence of said plaintiffs in refusing to make said payment of said $500.00, and not by reason of the fault, negligence, or delay of said defendants.

3rd. That if it was agreed, as stated in said answer, that said mill and appliances should be manufactured and shipped on the cars at the city of St. Louis on the 1st day of August, 1883, it was subsequent to the date of said agreement and prior to said 1st day of August, 1883; further agreed between said plaintiffs and defendants that if said defendants could not ship said mill on said 1st day of August that the same might be shipped as soon thereafter as said defendants could do so.

That said defendants did ship said mill as soon as they could do so, and, in fact, as soon as said plaintiffs were ready for the same.

That after said mill was shipped the same was received and accepted by said plaintiffs without making any claim for damages by reason of said pretended delay, and after having received the same the said plaintiffs settled with the defendants for the same by giving their notes therefor, the same being the notes mentioned in the petition of said plaintiffs, and said plaintiffs did not then or for more than one year thereafter claim anything for damages by reason of said
21 supposed delay; but, on the contrary, waived all right to demand or claim damages therefor; that said mill and appliances therewith connected fully filled the terms, requirements, and conditions of said warranty which said defendants gave when they sold said mill and appliances; that said plaintiffs never were notified or informed by said defendants that said mill failed to perform as warranted either immediately after one day's trial thereof, as by the terms of said warranty they were required to do if said mill did not so perform, or afterwards or at any time; that said mill and appliances did operate according to the terms of said warranty during all the time required by said warranty and for a long time thereafter, and if at any time the same did not so perform and oper-

ate it was in consequence of the fault and negligence of said plaintiffs and because said plaintiffs placed an insufficient and improper foundation under the same and because said plaintiffs, without the consent or knowledge of said defendants, changed and altered said mill and appliances, and because said plaintiffs did not operate and adjust the same properly and did not operate and adjust the same according to directions, and not in consequence of the fault in said mill or appliances or because the same did not fully fill the terms, requirements, and conditions of said warranty.

4th. That under and by virtue of the terms and conditions of the chattel mortgage given to secure the payment of the two (2) notes of $850.00 and $500.00 respectively and the interest thereon mentioned in said plaintiffs' petition the said defendants, on the 1st day of October, 1884, became and were entitled to the immediate possession of said mill and appliances; and that afterwards, on the second day of October, 1884,

22 the said defendants brought an action in replevin against the said plaintiffs in the circuit court of the United States for the district of Kansas to recover the possession of said mill and appliances, alleging that they were entitled to the possession thereof by virtue of said chattel mortgage and the breach of the conditions thereof, and alleging that their interest in said mill and appliances was the amount of said two notes of $850.00 and $500.00 respectively and the interest thereon, amounting then in the aggregate to the sum of about $1,450.00; that said plaintiffs appeared in said action and filed their answer therein, alleging that the said defendants had no interest in said mill and that nothing was due on account of said notes for the reason that said defendants were indebted to them in damages for and on account of the matters and things set out in the petition herein and as the cause of action sued upon herein — in a sum greater than the amount of said notes and interest and asking to have damages set off against said notes and interest, and that they might have judgment for balance; that said action of replevin was duly tried upon its merits and before said court and a jury, and a verdict returned therein by the jury finding that at the time of the commencement of said replevin action the said plaintiffs were entitled to the possession of said mill and appliances, and that at said time the value of their interest therein was $1,151.20, and that afterwards and on the 19th day of June, 1885, a judgment was duly rendered upon said verdict, and in accordance therewith by reason whereof said plaintiffs have had a former recovery against the said defendants upon the cause of action set out in the petition and sued on herein for the sum of $250.00.

5th. Further answering, and by way of a first counter-claim or set-off against the said plaintiffs, the said defendants say—

23 That on the 6th day of October, 1883, the said plaintiffs, as partners aforesaid, became and were indebted to the said defendants in the sum of $80.60 for and on account of goods, wares, and merchandise by the said defendants before that time sold and delivered to the said plaintiffs at their special instance and request; a copy of which said account is hereto attached, marked

"A," and made a part hereof. There are no credits or endorsements on said account, and there is now due thereon from the said plaintiffs to the said defendants the said sum of $80.60, together with interest thereon, at the rate of 7 per cent. per annum, from the 6th day of October, 1883, which said defendants claim.

6th. Further answering, and by way of a second and further set-off or counter-claim, the said defendants say—

That under and by virtue of the chattel mortgage given to secure the two notes of $350.00 and $500.00 respectively and the interest thereon mentioned in said plaintiffs' petition, the said defendants on the 1st day of October, 1884, became and were entitled to the immediate possession of the mill and appliances in said petition mentioned, and that on said day they duly demanded the possession of the same from the said plaintiffs, and the said plaintiffs refused to deliver to them such possession; that afterwards and on the second day of October, 1884, in order to recover the possession of said mill and appliances, they commenced a replevin action against the said plaintiffs in the circuit court of the United States for the district of Kansas, alleging that by virtue of said chattel mortgage they were entitled to the immediate possession thereof, and that their interest therein was the amount due on said two notes of $850.00 and $500.00 respectively and the interest thereon, and that the value of said mill was $1,200.00; which said action was afterwards duly tried upon its merits before said court
24 and a jury, and a verdict returned by said jury finding that said defendants were so entitled to the possession of said mill, and that the value of their interest therein at the time of the commencement of said suit was $1,151.20, and that the value of said property at said time was $1,200.00; that afterwards and on the 19th day of June, 1885, a judgment was duly rendered upon said verdict and in accordance therewith for the return of said property to said defendants or that said plaintiffs pay said defendants the value of their interest therein in accordance with said verdict; that said plaintiffs did not and never have paid said defendants the amount due on said two promissory notes or any part thereof or the value of their interest in said property or any portion thereof, but that afterwards and on or about the 10th day of August, 1885, they returned said property to said defendants.

That said defendants immediately upon getting possession of said property sold the same under and by virtue of their chattel mortgage, in accordance with the statute in such case made and provided, but were only able to realize therefrom the sum of $50.00.

That said plaintiffs wrongfully and unjustly detained possession of said property from said defendants from said first day of October, 1884, to said 10th day of August, 1885, and during all of said time had the use, possession, and enjoyment of said property; that said property on said first day of October, 1884, was worth the sum of $1,200.00, but that by reason of the possession thereof by the said plaintiffs from said time until the 10th day of August, 1885, and the use and wear thereof by the said plaintiff during said time, and the abuse and want of proper care of said property by said plain-

tiffs during said time, said property when so returned to said defendants as aforesaid was worth not more than the sum of $50.00,
25 and was damaged in the sum of $1,150.00 by said use and abuse; that the use of said property during said time that it was so wrongfully and unjustly detained by said plaintiffs from said defendants was of the value of $750.00 besides the damage thereto as aforesaid.

That by reason of said wrongful and unjust detention of said property from said defendants by said plaintiffs said defendants were damaged in the sum of $1,000.00. No part of said two promissory notes, one for the sum of $500.00 and the other for the sum of $850.00, executed and delivered to the said defendants by the said plaintiffs as aforesaid, has ever been paid, except as aforesaid, and by the terms of said promissory notes there is now due thereon from the said plaintiffs to the said defendants the sum of $1,350.00, together with interest thereon at the rate of ten per cent. per annum from the 15th day of August, 1883.

Wherefore said defendants pray judgment against said plaintiffs for the sum of $3,500.00 and interest thereon from August 15th, 1883, and the cost of this action.

PECK, JOHNSON & McFARLAND,
Attorneys for Defendants.

Endorsement: No. 881. District court, Rice county. Clement and Eustis & Co., plaintiffs, *vs.* J. A. Field & Co., defendants. Answer of defendants. Filed August 31st, 1885. S. J. Smith, clerk. Peck, Johnson and McFarland, attorneys for defendants.

26 "A."

ST. LOUIS, MO., *Oct. 14th*, '84.

Clement and Eustis & Co., Sterling, Kans., to J. A. Field & Co., Dr.

1883.			
Aug. 30.	½ doz. saccharometers, 1.25	7 50	
	Less 25%	1 87	
		5 63	
	7 proff. glasses, net 60	4 20	
			9 83
Sept. 12.	2 steel-wire brushes	95	
	1 bbl. gague rod	85	
	1 out edge	80	
	1 doz. sample bottles	75	
			3 35
Sept. 19.	1 knife or scraper	9 00	
	Less ⅓	3 00	
			6 00
Sept. 26.	Expense of man to fix mill		40 00
Sept. 26.	1 botton plate	6 00	
	Less ⅓	2 00	
			4 00

Sept. 27.	1 scraper	9 00		
	Less ⅓	3 00		
			6 00	
Oct. 6.	1 pc. rubber, 1″ x 9″ x 36, 25½ lbs., @ 1.40	35 70		
	Less 40%	14 28		
			21 42	
				90 60

1883.

CREDITS.

Oct. 6.	By cash		10 00
			80 60

27 And on the 1st day of September, 1885, it being the first judicial day of the September term, 1885, of the district court of the 20th judicial district of the State of Kansas, sitting within and for Rice county, the defendants filed their petition asking that said cause be removed into the circuit court of the United States for the district of Kansas.

And said petition was in words and figures as follows, to wit:

STATE OF KANSAS, *Rice County,* } ss:

In the District Court within and for the County of Rice and State Aforesaid.

W. P. CLEMENT, M. B. CLEMENT, and CHARLES Eustis, Partners Doing Business under the Firm Name and Style of Clement & Eustis & Co., Plaintiffs,

vs.

J. A. FIELD and ALEXANDER MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants.

} Petition of Defendants to Remove Cause.

And now comes the above-named defendants, J. A. Field and Alexander McGee, late partners doing business under the firm name and style of J. A. Field & Co., and say to the court as follows:

That the above-entitled suit was brought against your petitioners, J. A. Field and Alexander Magee, partners doing business under the firm name and style of J. A. Field & Co., on the 10th day of August, 1885, by filing a petition in said suit and causing a summons to be issued thereon; that your petitioners have duly appeared in said suit and have filed their answer therein.

That said cause has not yet been tried, and that this is the first term of the said district court at which the same could be tried; that at the time said suit was begun the said plaintiffs, W. P. Clement, M. B. Clement, and each of them was and still is a

28 citizen of the State of Kansas, and that the said plaintiff, Charles Eustis, at the time said suit was begun was and still

is a citizen of the State of Wisconsin; that the said defendants, J. A. Field and Alexander Magee, and each of them at the time said suit was begun was and still is a citizen of the State of Missouri; that the amount in dispute in said suit and for which said suit is brought exceeds the sum or value of $500.00, exclusive of costs, and the controversy in said suit is between citizens of different States; and the said defendants herewith offer a bond, with J. C. Turner as their surety, for their entering in the circuit court of the United States for the district of Kansas (said district of Kansas being the district wherein said suit is pending) on the first day of the next session of said court or before a copy of the record in said suit and copies of *of* all processes, pleadings, depositions, testimony, and other proceedings in the cause, and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that said suit was wrongfully removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein.

Wherefore said defendants pray this honorable court that said cause be removed into the circuit court of the United States for the district of Kansas and this court proceed no further in the premises except to make the order of removal required by law and to accept said surety and bond and cause the records herein to be removed into the said circuit court of the United States for the district of Kansas.

PECK, JOHNSON AND McFARLAND,
Attorneys for Petitioners.

29 STATE OF KANSAS, } *ss:*
County of Rice, }

J. K. Mayberry, being duly sworn, says that he is the agent of the above-named petitioners, J. A. Field & Co.; that he has read the foregoing petition, and that the facts therein stated are true, as he verily believes.

J. K. MAYBERRY.

Subscribed and sworn to before me this 1st day of September, A. D. 1885.

[SEAL.]

S. J. SMITH,
Clerk D. C.

Endorsed: No. 881. District court, Rice county. Clement and Eustis & Co., plaintiffs, *vs.* J. A. Field & Co., defendants. Petition of defendants to remove cause. Filed September 1st, 1885. S. J. Smith, clerk. Peck, Johnson & McFarland, att'ys for defendants.

And said defendants presented their bond, which was duly filed and is in words and figures as follows, to wit:

STATE OF KANSAS, } ss:
County of Rice, }

In the District Court within and for the County of Rice and State Aforesaid.

W. P. CLEMENT, M. B. CLEMENT, and CHARLES Eustis, Partners Doing Business under the Firm Name and Style of Clement and Eustis & Co., Plaintiffs,
vs.
J. A. FIELD and ALEXANDER MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants.
} Bond for Removal.

Know all men by these presents that we, J. A. Field and Alexander Magee, as principal-, and J. C. Turner, as surety, are held and firmly bound unto the aforesaid W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the
30 firm name and style of Clement and Eustis & Co., in the penal sum of $500.00; to the payment of which, well and truly to be made, we bind ourselves, jointly and severally and firmly, by these presents.

The conditions of this obligation are such that whereas the said J. A. Field and Alexander Magee, partners as aforesaid, have applied to the district court within and for the county of Rice, in the State of Kansas, to remove a certain cause pending in said court, wherein said W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name, and style of Clement and Eustis & Co., are plaintiffs and said J. A. Field and Alexander Magee, partners doing business under the firm name and style of J. A. Field & Co., are defendants, from said district court to the circuit court of the United States for the district of Kansas:

Now, if the said J. A. Field and Alexander Magee shall enter in the said circuit court of the United States for the district of Kansas, on the 1st day of the next session thereof, a copy of the record in said suit and copies of all process, pleadings, depositions, testimony, and other proceedings in said cause, and shall pay all the costs that may be awarded by said circuit court if it shall be held that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said suit if special bail was originally requisite therein, then this obligation shall be void; otherwise shall be and remain in full force and effect.

J. A. FIELD.
ALEX. MAGEE.
J. C. TURNER.

STATE OF KANSAS, } ss:
Rice County, }

J. C. Turner, being duly sworn, says that he has signed the
31 above as surety, and that he is worth the sum of $500.00

over and above all debts, liabilities, and exemptions in property in the State of Kansas.

And further saith not.

J. C. TURNER.

Subscribed and sworn to before me this 28th day of August, 1885.

[SEAL.] P. HIMROD,
Notary Public.

Term expires June 12th, 1888.

Endorsed: No. 881. District court. Clement & Eustis & Co., plaintiffs, *vs.* J. A. Field & Co. defendants. Bond for removal. Filed Sept. 1st, 1885. S. J. Smith, clerk. Peck, Johnson & McFarland, att'ys for defendants.

Whereupon, on the 1st day of September, A. D. 1885, the same being the 1st judicial day of the September term, 1885, of the district court in the 20th judicial district of the State of Kansas, sitting within and for the county of Rice, the petition and bond of said defendants was duly considered by the court and the prayer thereof granted and an order made; which said order, judgment, and decree of the court *is* in words and figures as follows, to wit:

STATE OF KANSAS, } *ss:*
County of Rice, }

In the District Court within and for the County of Rice and State of Kansas.

W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of Clement and Eustis & Co., Plaintiffs,
vs.
J. A. FIELD and ALEXANDER MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants.
} Journal Entry.

On the pleadings and proceedings herein and on the petition filed herein by the defendants praying for the removal of this cause
32 into the circuit court of the United States for the district of Kansas, pursuant to the statute of the United States in such case made and provided, and the bond filed with such petition by said defendants, with good and sufficient surety, for their entering in said circuit court on the 1st day of the next session thereof a copy of the record in said suit and copies of all process, pleadings, depositions, testimony, and other proceedings in said cause, and for paying all costs that may be awarded by said circuit court if said court should hold that said suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in said suit if special bail was originally required therein, now, on motion of Peck, Johnson and McFarland, attorneys for said defend-

ants, it is hereby ordered that the security offered by the said defendants be accepted and approved, and that this court proceed no further in this cause; that said motion be granted, and that this cause be wholly removed into the circuit court of the United States for the district of Kansas.

G. W. NIMOCKS,
Judge 20th Dist. Ks.

Endorsed: No. 881. District court, Rice county. Clement and Eustis & Co., plaintiffs, *vs.* J. A. Field & Co., defendants. Journal entry. Filed Sept. 1st, 1885. S. J. Smith, clerk. Entered on Journal 3, page 85. Peck, Johnson, and McFarland, att'y- for def'ts.

THE STATE OF KANSAS, } ss:
20th Judicial District, Rice County, }

I, S. J. Smith, clerk of the district court of the 20th judicial district of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be a full, true, and complete copy of each and every of the pleadings, papers, & writs—that is to say:

33 1. Petition of plaintiffs.
2. Affidavit for publication.
3. Affidavit for attachment.
4. Præcipe for summons and attachment.
5. Summons, writ, and return.
6. Order of attachment, writ, and return.
7. Answer of defendants.
8. Petition for removal.
9. Bond for removal.
10. Journal entry.

Together with the returns and endorsements on each and a full transcript of the proceedings in the therein-entitled cause, as the same remains on file and of record in my office.

Witness my hand and the seal of said court affixed, at [SEAL.] my office, in Lyons, in said county and State, on this the 19th day of September, A. D. 1885.

S. J. SMITH,
Clerk of the Dist. Court.

THE STATE OF KANSAS, } ss:
20th Judicial District, Rice County, }

I, S. J. Smith, clerk of district court of the 20th judicial district of the State of Kansas, sitting within and for Rice county, do hereby certify that the costs as accrued in the case of Clement and Eustis & Co., plaintiffs, *vs.* J. A. Field & Co., defendants, in the said court, as shown by the appearance docket, *is* $31.65, including cost of this transcript; that the plaintiffs have deposited as security for
34 the costs the sum of $15.00, and that the defendants, J. A. Field & Co., have paid $9.20, the cost of this transcript.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at my office, this 19th day of September, 1885.

S. J. SMITH,
Clerk Dist. Court.

Endorsed: No. 5234. Clement, Eustis & Co. *vs.* J. A. Field & Co. Transcript. Filed Oct. 23, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy.

35 In the District Court of Rice County, State of Kansas.

W. P. CLEMENT, M. B. CLEMENT, CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of Clement and Eustis & Co., Plaintiffs,
versus
J. A. FIELD & ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants.
} Reply.

Come now the plaintiffs in above-entitled action, and, in reply to the special matter alleged in the 2nd, 3rd, 4th, and 5th counts of defendants' answer and all and singular the averments therein set forth in said answer, say—

First. They deny each and every all and singular the allegations and averments of facts in said answer and every count and part thereof contained and set forth.

Second. Plaintiffs state that *at* the time of the cash payment of $500, mentioned in the petition and referred to in defendants' answer, was not made a condition of said contract for the manufacture and sale of said mill, nor was the same so understood by the parties, nor were the defendants not under obligation to commence the manufacture of said mill until said cash payment was made, and no such conditions were included in said contract, nor was the time of the payment of said money by said contract made a condition precedent to the performance of said contract by said defendants in the manufacture of said mill and the shipment of said mill and the appliances and fixtures.

Plaintiffs further aver that at the time of the making of said contract it was agreed and understood by and between the parties to said contract that plaintiff should and agreed to make said cash payment and pay said $500 as soon as the plaintiff W. P.
36 Clement, who made the contract for the manufacture and purchase of said mill, should return to his home in Sterling, Kansas, and when done should be in full satisfaction and discharge of said cash payment; that accordingly, on the return of said Clement to his said home, to wit, on the 2nd day of July, 1885, just eight days after the date of said contract, the plaintiffs remitted said $500 to defendants at St. Louis, who, without any protest or claim for delay and without any claim for breach of said contract by said plaintiffs, received said $500 *dollars* in full satisfaction and

discharge of said cash payment and a full performance on their part of said contract, and said defendants, in their acknowledgement of the receipt of said $500 on the said July 2nd, 1883, to said plaintiffs, said, "Please accept our thanks" for same, and *was* perfectly satisfied therewith as full performance of said contract by plaintiffs, and no objections were made thereto until litigation arose about and concerning the contract for the manufacture and sale of said mill.

Third. If the plaintiffs received and accepted said mill without making any claim for damages by reason of said delay in shipping said mill and the appliances under said contract, it was done with the hope that said mill would perform as warranted by said defendants and as alleged by plaintiffs in their petition; and if said mill had so operated plaintiffs could and would have been able to manufacture their said cane into syrup and molasses in due season and would not have lost much, if any, of their said cane in consequence of not being able to manufacture same in due season; and if said plaintiffs executed and delivered their said notes and mortgage to secure the purchase-money for said mill, nevertheless the delay in its shipment under said contract, it was because plaintiffs were unable to procure a mill elsewhere to manufacture their said
37 cane and were compelled to receive said mill or they would have lost all their cane, and it was because of all of these facts they received said mill and gave their said notes and not otherwise; wherefore the plaintiffs did not waive their damages sustained in consequence of said delay; that said mill and appliances did not perform the terms and requirements as by plaintiffs alleged in their said petition; — all of which facts they notified the defendants, and who had full knowledge of the same; that the foundation under said mill was constructed of good material and in a good and workmanlike manner, and that if any changes and alterations were made in and about said mill it was done by plaintiffs and their agents and under their direction and consent.

Fourth. Plaintiffs admit that the defendants brought an action in replevin in the United States circuit court for the district of Kansas to recover the possession of said mill and appurtenances under a chattel mortgage, as averred in the fourth count of their said answer; plaintiffs also admit that they appeared to said action and set up the defense to said action as therein alleged, but plaintiffs aver the facts to be, after they set up their said defense claiming damages for the breach of said warranty and said contract set out in plaintiffs' petition herein and sought to recover judgment thereon for their damages by them sustained under the breaches of said contract and warranty therein contained, and which said defense was, upon the defendants' motion to said court, ruled out from the record of said court, and the plaintiffs were not permitted to make said defense nor recover their damages in said suit of replevin, and that said court held, and so stated in open court, that said motion in replevin was purely a possessory action, and that said plaintiffs, as defendants therein, could not recover for any damages they may have sustained in consequence of the breaches of said war-
38 ranties, and that the only way which they could recover re-

dress therefor would be by an action by them brought upon said contract therefor in damages, wherefore said damages were not adjusted in said replevin action nor adjudicated therein, nor did nor could plaintiffs recover any damages therein in $250 or any other sum, nor was plaintiffs' cause of action herein adjudicated in said action.

Fifth. If plaintiffs ever received the goods as alleged in the fifth count of their answer and as set out in "Exhibit A," annexed thereto, the same was furnished by defendants under their said contract for the manufacture and sale of said mill and appliances in their attempt to make the same perform under their said warranty and not otherwise, and for which nor any part thereof are said defendants entitled to recover herein.

Sixth. Plaintiffs, for further and in reply to the sixth count of defendants' answer, admit the commencement of said action under chattel mortgage by replevin in the United States circuit court by defendants as plaintiffs against said plaintiffs as defendants therein to recover the possession of said mill and appliances, but aver that said defendants, upon getting possession of said property, did not proceed to sell said property under said chattel mortgage as they were bound to do under said chattel mortgage and decree of said court, and by the terms of said mortgage and the statutes of said State the defendants, as the mortgagees therein, were required, before selling said property, to give public notice of the time and place of sale by written or printed hand-bills, posted up in at least four public places in the township or city in which the property was to be sold at least ten days previous to said sale; that after said defendants had received said property, to wit, on the 6th day of August, 1885, the said defendants, as such mortgagee therein-, by J. K. Mayberry, their
39 agent, gave said notice to sell said property at public auction, at 10 o'clock a. m. on the 28th day of August, 1885, at H. T. Dunlap's wareroom, on switch south of depot in the city of Sterling, in the said county and State; that said defendants, by their said agent, fraudulently and willfully did not sell said property at the time and place designated and stated in said notice, but on the contrary fraudulently and clandestinely, and to prevent bidders on said property, pretended to sell the same at another place and different place and unbeknown to plaintiffs and the public, and said defendants, by their said agent, did pretend to sell said property to themselves for firty dollars; whereas the same wou ld have sold for sufficient to have paid said debt and cost if the same had been sold as required by said mortgage and the notes given to said defendants, so that if said property failed to sell for sufficient to pay said debt, interest, and costs it was the fault of defendants, and plaintiffs in consequence thereof have been damaged in the sum of five thousand dollars.

Wherefore plaintiffs, having fully replied to defendants' answer, asks judgment as prayed for in their petition herein, costs, and other relief.

JETMORE & SON,
Attorneys for Plaintiffs.

Endorsed: No. 5234. Rice Co., dist. court. Clements & Eustis Co., pl'ffs, *vs.* J. A. Field & Co., def'ts. Reply. Jetmore & Son, att'ys for pl'ffs. Rec'd Sept. 10th, 1885, and ret. to att'ys. S. J. Smith, clerk dist. court, Rice Co., Kansas. Leave given to file this reply. C. G. Foster, judge. Filed Oct. 30, 1885. A. S. 40 Thomas, clerk, by Frank H. Holt, deputy.

UNITED STATES OF AMERICA, } ss:
District of Kansas. }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 23rd day of November, A. D. 1885, proceedings were had and appear of record in words and figures following, to wit:

FRIDAY, *Dec.* 4, 1885.

CLEMENT AND EUSTIS AND COMPANY } 5234.
vs.
J. A. FIELD & CO.

Continued.

41 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 28th day of November, A. D. 1887, proceedings were had and appear of record in words and figures following, to wit:

WEDNESDAY, *Dec.* 7, 1887.

CLEMENTS, EUSTIS & CO. } 5234.
vs.
J. A. FIELD & CO.

Now come the plaintiffs herein, by Jetmore & Son, their attorneys, and also come the defendants herein, by J. D. McFarland, their attorney; and thereupon this action came on for trial, and the parties hereto, by their attorneys, waive a jury by written stipulation filed herein and submit the premises to the court; and thereupon the court, having heard the evidence adduced and arguments of counsel, now find for the defendants.

It is therefore now by the court here considered, ordered, and adjudged that said defendants, J. A. Field & Co., have and recover of and from said plaintiffs, Clements, Eustis & Company, their costs in this action expended, and that execution issue therefor. The costs made on defendants' counter-claim is for defendants to pay, as they were defeated; all other costs plaintiffs pay.

42 SATURDAY, *January* 14, 1888.

W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of Clement, Eustis & Co., Plaintiffs,
vs.
J. A. FIELD and ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants. } 5234.

Now come said plaintiffs and present their bill of exceptions taken on the trial of this cause, and the same is allowed and signed and ordered to be placed on file with the pleadings and made a part of the record in this cause.

It is ordered by the court that said bill of exceptions be now filed and said order be now entered for and as of December 7, 1887.

43 In the Circuit Court of the United States in and for the District of Kansas.

W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of Clement, Eustis & Co., Plaintiffs,
vs.
J. A. FIELD and ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants. } No. 5234.

Plaintiff's Bill of Exceptions.

Be it remembered that on the 7th day of December, 1887, the same being a regular judicial day of the November term, 1887, of the circuit court of the United States in and for the district of Kansas, held at the city of Topeka, in said State, the above action came on regularly for trial, the plaintiffs appearing by Jetmore & Son, their attorneys of record, and the defendants appearing by J. D. McFarland, Esq., their attorney of record, and by their stipulation in writing filed with the clerk of said court, signed by the respective attorneys of record of the parties, the parties waived a jury in said case; which stipulation is in the words and figures following, to wit:

"In the Circuit Court of the United States for the District of Kansas.

CLEMENT, EUSTIS & Co.
vs.
J. A. FIELDS & Co. } No. 5234.

Stipulation Waiving a Jury.

The parties to this action hereby waive the intervention of a jury and agree that this action may be tried by the court.

JETMORE & SON,
Attorneys for Plaintiff.
J. D. McFARLAND,
Attorneys for Defendant."

44 Endorsed: "No. 5234. Clement, Eustis & Co. *vs.* J. A. Field & Co. Stipulation waiving jury. Filed Dec. 7th, 1887. A. S. Thomas, clerk."

And thereupon the plea or fourth defense of said defendants set out in their answer, to wit, the plea or defense that there had been a former adjudication and recovery against said defendants upon the causes of action set out in the petition herein and sued for in this action, was heard and submitted to the court upon said plea or fourth defense in said answer and the evidence introduced in support thereof for the decision of the court upon the matters presented by said plea or fourth defense in said answer.

The defendants, in support of said plea and issues on their part, introduced the following testimony, to wit:

Whereupon the defendants offered and read in evidence the original papers and files, consisting of petition and precipe, affidavit for replevin and bond, the amended answer, amended reply, the instructions of the court, the judgment, "motion for new trial," and "decision of court overruling motion for new trial," in the replevin action, case No. 4812, filed and begun October 2nd, 1884, in the circuit court of the United States for the district of Kansas, wherein J. A. Field and Alex. Magee, partners doing business under the firm name and style of J. A. Field & Co., were plaintiffs and W. P. Clement, M. B. Clement, and Charles Eustis, doing business under the firm name and style of Clements, Eustin & Co., were defendants, which, together with all endorsements thereon, are in words and figures following, to wit:

The petition and precipe in said replevin action are in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

45 In the Circuit Court of the United States for said District of Kansas.

J. A. FIELD & ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Plaintiffs,
vs.
W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of Clements, Eustis & Co., Defendants. } Petition.

The said plaintiffs say that they, the said J. A. Field and Alex. Magee, and each of them are residents of the city of St. Louis, in the State of Missouri, and that each of them are citizens of the State of Missouri.

That the said defendants, W. P. Clement, M. B. Clements, and Charles Eustis, are residents of the county of Rice, in the State of Kansas, and that they and each of them are citizens of the State of Kansas.

That the said plaintiffs, J. A. Field and Alex. Magee, are now and have been continuously for more than two years last past partners in trade doing business under the firm name and style of J. A. Field & Co.

That the said defendants, W. P. Clements, M. B. Clements, and Charles Eustis, are now and have been for more than two years last past partners in trade and doing business under the firm name and style of Clements, Eustis & Co.

That on or about the 15th day of August, 1883, said defendants, as partners as aforesaid, purchased of said plaintiffs the certain specific personal property hereinafter mentioned and described, and for a part of the consideration for said property so purchased executed and delivered to said plaintiffs their two certain promissory notes in writing of that date, one for the sum of five hundred
46 dollars and the other for the sum of eight hundred fifty dollars. Said promissory note for five hundred dollars was signed and executed by said defendants by their firm name, and by said note said defendants promised to pay to the order of said plaintiffs on the first day of November, 1883, after the date thereof the sum of five hundred dollars, the said five hundred dollars being payable at the banking-house of J. Hanna & Co., with interest thereon from maturity at the rate of 10 % per annum. Said promissory note for the sum of eight hundred and fifty dollars was signed and executed by the said defendants by their said firm name, and by said note said defendants promised to pay to the order of said plaintiffs on the first day of November, 1884, the sum of eight hundred and fifty dollars, payable at the banking-house of J. Hanna & Co., with interest from date at six per cent. per annum and after maturity at ten per cent. per annum.

That on the 19th day of August, 1883, and in order to secure the payments of said two promissory notes and the money to become due thereon the said defendants, who are the parties of the first part in said mortgage, by the name of Clements & Eustis, executed and delivered to said plaintiffs, who are the parties of the second part in said mortgage, their certain chattel mortgage in writing of that date, whereby they sold, assigned, transferred, and set over to said plaintiffs the following-described specified personal property, to wit:

The one Star cane mill No. 7; main roll, 24 inch. in diameter; the lower rollers, 20 inches clear in diameter; all rolls 3 feet long, including double-gearing cane-carriers and bagassee-carriers complete. Said mill was made by J. A. Field & Co., St. Louis.

Said chattel mortgage had thereon written a condition providing in substance that if the debt represented by the aforesaid notes
47 and interest thereon should be paid as specified in said notes, then said sale and transfer shall be void.

The said mortgage also contained the further stipulation and agreement, to wit:

"The property sold is to remain in the possession of said parties of the first part until default be made in the payment of the debt and interest aforesaid or some part thereof, but in case of a sale or disposal or attempt to sell or dispose of the same or a removal of or

attempt to remove the same from Rice Co., Kansas, or an unreasonable depreciation in the value, or if from any other cause the security shall become inadequate, the said parties of the second part may take said property or any part thereof into their own possession, and upon taking said property into their possession, whether in case of default or as above provided, said parties of the second part shall sell the same at public or private sale, and, after satisfying the aforesaid debt and interest thereon and all necessary and reasonable costs, charges, and expenses incurred, out of the proceeds of sale they shall return the surplus to said parties of the first part or their legal representatives; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said parties of the first part hereby agree to pay the deficiency."

Said personal property at the time of the execution of said mortgage was and now is situated in the county of Rice, in the State of Kansas, and said defendants and each of them at the time of the execution of said mortgage were and now are residents of the county of Rice and in the State of Kansas.

Forthwith upon the execution of said mortgage said plaintiffs deposited the same in the office of the register of deeds in and for the county of Rice, in the State of Kansas: and thereupon
48 said register of deeds filed the same in his office, where it has ever since been and now remains.

On the 29th day of July, 1884, said J. A. Field, one of the aforesaid firm of J. A. Field & Co., made and attached to and filed with said chattel mortgage an affidavit exhibiting the interest of said plaintiffs at said time in said chattel mortgage and mortgaged property and exhibiting the amount then due and unpaid upon the indebtedness, to secure which said chattel mortgage was given as aforesaid.

Said plaintiffs are still the owners and holders of said promissory notes and entitled to the money due and to become due thereon. Said promissory note for the sum of $500 became due on the 1st day of November, 1883, and no part thereof has been paid, and there is now due thereon from the said defendants to the said plaintiffs the said sum of $500, with interest thereon at the rate of 10 % per annum from the 1st day of November, 1883. Said note for the sum of $850 will become due on the 1st day of November, 1884. No part of said note has ever been paid, and the indebtedness to become due thereon on the 1st day of November, 1884, is $850, with interest thereon at the rate of 6 % per annum from the 15th day of August, 1883. Said last-mentioned note will bear interest at the rate of 10 % per annum from the 1st day of November, 1884.

Said defendants have made default in the payment of said note for $500, by reason whereof said plaintiffs, by virtue of the conditions of said mortgage, are entitled to take said personal property into their possession.

Said personal property has become and now is inadequate security for the payment of said indebtedness, to secure which said chattel mortgage was given, by virtue whereof and by virtue of the condi-

tions of said chattel mortgage said plaintiffs are entitled to
49 take said property into their possession.

Said plaintiffs have duly demanded of said defendants possession of said personal property, and said defendants have refused to give and surrender such possession to said plaintiffs.

The actual value of said personal property is $1,200.

Said plaintiffs further say that by reason of the facts hereinbefore set out they have a special ownership in said personal property, goods, and chattels, and are entitled to immediate possession thereof, and that the said defendants wrongfully and unjustly detain in their possession and from the said plaintiffs the said personal property, goods, and chattels, and that said defendants so wrongfully detained the possession of said personal property for the space of one day next before the commencement of this action, wholly depriving said plaintiffs of all use and benefits thereof.

Wherefore said plaintiffs pray judgment against the said defendants for the recovery of the possession of said personal property and for the possession thereof or the value thereof in case a delivery of said personal property, goods, and chattels cannot be had, and for costs of suit.

PECK, JOHNSON & McFARLAND,
Attorneys for Plaintiffs.

Precipe.

The clerk of said court will issue a summons in the above-entitled action for said defendants, directed to the marshal of said district, returnable according to law.

Also an order for the delivery of said personal property to said plaintiffs.

PECK, JOHNSON & McFARLAND,
Attorneys for Plaintiffs.

50 On the back of which are the following endorsements:

No. 4812. U. S. circuit court. J. A. Field & Alex. Magee *vs.* W. P. Clement, M. B. Clement, and Charles Eustis. Petition and precipe. Filed Oct. 2nd, 1884. A. S. Thomas, clerk. Peck, Johnson & McFarland, attorneys for plaintiffs.

Defendants next offered and read in evidence the original affidavit in replevin in said replevin action, which is in words and figures following, to wit:

THE UNITED STATES OF AMERICA, } ss:
District of Kansas, County of Rice, }

In the Circuit Court of the United States for the District of Kansas.

J. A. FIELD and ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Plaintiffs,
vs.
W. P. CLEMENT, M. B. CLEMENT, and Charles Eustis, Partners Doing Business under the Firm Name and Style of Clement, Eustis & Co., Defendants.
} Affidavit in Replevin.

J. K. Mayberry, of lawful age, being first duly sworn, deposes and says—

That he is the duly authorized agent of said plaintiffs; that said plaintiffs are and have been for more than two years last past a copartnership firm, composed of J. A. Field and Alexander Magee, and are doing business under the firm name and style of J. A. Field & Co.; that said defendants are and have been for more than one year last past a copartnership firm, composed of W. P. Clement, M. B. Clement, and Charles Eustis, and are doing business under the firm name and style of Clements and Eustis & Co.

51 That said plaintiffs are about to commence a civil action against the said defendants in the circuit court of the United States for the district of Kansas to recover possession of the following specific personal property, described as follows, to wit:

One Star cane mill No. 7; main roll 24 inches in diameter; lower rollers 20 inches clear in diameter; all rolls 3 feet long, including double gearing, cane-carriers, and bagasse-carriers complete. Said mill was made by J. A. Field & Co., St. Louis. Said plaintiffs have a special ownership and interest in said personal property by reason of the following state of facts:

On or about the 15th day of August, 1883, said defendants, who were then partners as aforesaid, purchased of said plaintiffs said personal property, and for a part of the consideration for said property so purchased executed and delivered to said J. A. Field & Co. two certain promissory notes—one for the sum of $500 and the other for the sum of $850. Said promissory note for the sum of $500 was dated Sterling, Kansas, August 15th, 1883, and was signed and executed by the said defendants by their said firm name, and by said note said defendants promised to pay the said plaintiffs, on the 1st day of November, after the date thereof, the sum of $500, payable at the banking-house of J. Hana & Co., with interest from maturity at the rate of 10 — per annum. Said other note was dated at Sterling, Kansas, August 15th, 1883, and was executed by said defendants by their said firm name, and said defendants by said note promised to pay to said plaintiffs, on the 1st day of November, 1884, the sum of $850 for value received, payable at the banking-house of J. Hanna & Co., with interest from date at 6 % and

after maturity at 10 % per annum. On the said 15th day of August, 1883, in order to secure the payment of said two promissory notes and the sums of money and interest to become due
52 thereon, the said defendants, parties of the first part in said mortgage, by the name of Clements & Eustis, executed and delivered to said plaintiffs, parties of the second part in said mortgage, their certain chattel mortgage in writing of that date whereby they sold and assigned, transferred and set over, to said plaintiffs said personal property hereinbefore described. Said chattel mortgage was conditioned that if said debt and interest be paid as specified in said notes, then the sale and transfer of said property shall be void. Said chattel mortgage also contained the further stipulation and agreement, "said property sold is to remain in the possession of said parties of the first part until default be made in the payment of the debt and interest aforesaid or some part thereof, but in case of a sale or disposal or attempt to sell or dispose of the same, or a removal of or attempt to remove the same from Rice county, Kansas, or an unreasonable depreciation in the value, or if from any other cause the security shall become inadequate, said parties of the second part may take such property or any part thereof into their possession, and upon taking said property into their possession, either in case of default or as above provided, said parties of the second part shall sell the same at public or private sale, and, after satisfying the aforesaid debt and interest thereon and all necessary and reasonable costs, charges, and expenses incurred, out of the proceeds of said sale they shall return the surplus to said parties of the first part or their legal representatives, and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said parties of the first part hereby agree to pay the deficiency."

Said personal property at the time of the execution of said mortgage was and is now situated in the county of Rice and the State
53 of Kansas, and said defendants and each of them at the time of the execution of said mortgage were and now are residents of the county of Rice, in the State of Kansas.

Forthwith upon the execution of said mortgage the plaintiffs deposited the same in the office of the register of deeds in and for the county of Rice, in the State of Kansas; and thereupon said register filed the same in his said office, where it has ever since been kept and now remains. On the 29th day of July, 1884, said J. A. Field, of the firm of J. A. Field & Co. aforesaid, made and attached to and filed with the said chattel mortgage an affidavit exhibiting the interest of said plaintiffs at said time in said mortgage and the amount then due and unpaid upon the indebtedness, to secure which said chattel mortgage was given.

Said plaintiffs are still the owners and holders of said promissory notes and entitled to the money due and to become due thereon; said promissory note for the sum of $500 became due on the 1st day of November, 1883, and no part thereof has ever been paid, and there is now due thereon from said defendants to said plaintiffs said sum of $500, with interest, at the rate of 10 %, from the 1st day of November, 1883.

Said note for $850 will become due on the first day of Nov., 1884; no part thereof has ever been paid, and the indebtedness to become due thereon on the 1st day of Nov., 1884, is $850, with interest thereon, at the rate of 6 % per annum, from the 15th day of August, 1883.

Said defendants have made default in the payment of said note for $500, by reason whereof said plaintiffs are entitled to take said property into their possession.

Said personal property has become and is inadequate security for the payment of said indebtedness, by reason whereof said plaintiffs are entitled to the possession of said property. Said plain-
54 tiffs have duly demanded of said defendants the possession of said personal property, and said defendants have refused to give and surrender such possession to said plaintiffs.

That said personal property is wrongfully detained by the said defendants.

That said personal property was not taken in execution on any order or judgment against said plaintiffs or for the payment of any tax, fine, or amercement assessed against said plaintiffs or either of them or by virtue of any order of delivery issued under the articles of the Code of Civil Procedure of the State of Kansas providing for the replevin of property or on any other mesne or final process issued against said plaintiffs or either of them.

The actual value of said property is $1,200.00.

Further affiant saith not.

J. K. MAYBERRY.

Subscribed *and* in my presence and sworn to before me this 1st day of Oct., 1884.

[SEAL.] W. U. QUIGLEY,
Notary Public.

Com. ex. Dec. 10, '85.

On the back of which are the following endorsements:

No. 4812. U. S. circuit court. J. A. Field & Alex. Magee, plaintiffs, *vs.* Clement & Eustis, defendants. Affidavit in replevin. Filed Oct. 2nd, 1884. A. S. Thomas, clerk. Peck, Johnson & McFarland, att'ys for plaintiffs.

Whereupon the defendants introduced and read in evidence the undertaking in replevin, filed in said original replevin action, filed in the United States circuit court for the district of Kansas; which replevin undertaking is in words and figures following, to wit:

55 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

In the Circuit Court of the United States for the District of Kansas.

J. A. FIELD & ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Plaintiffs,
vs.
W. P. CLEMENT, M. B. CLEMENT, and Charles Eustis, Partners Doing Business under the Firm Name and Style of Clements, Eustis & Co., Defendants. } Replevin Undertaking.

Whereas J. A. Field and Alex. Magee, doing business under the firm name and style of J. A. Field & Co., have commenced a civil action in the circuit court of the United States for the district of Kansas against W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name and style of Clements, Eustis & Co., for the recovery of the possession of certain personal property in which said plaintiffs have a special interest and ownership and to the immediate possession of which said plaintiffs are entitled:

Now we, the undersigned, residents of said district and State, bind ourselves to said defendants in the sum of twenty-four hundred dollars that said plaintiffs shall duly prosecute the above action and pay all costs and damages that may be awarded against them, and, if the return of the property therein delivered to them be adjudged, that they will deliver the same to said defendants.

J. C. TURNER.
J. K. MAYBERRY.

Approved by me this 2nd day of October, 1884.
A. S. THOMAS, *Clerk.*

56 UNITED STATES OF AMERICA, } ss:
District of Kansas, Rice County, }

I, the undersigned, surety on the within undertaking, do solemnly swear that I am a resident of the district of Kansas and State of Kansas, and that I am worth three thousand dollars over and above all examptions, debts, liabilities in property in the State of Kansas, so help me God.

J. C. TURNER.

Subscribed and sworn to before me this 1st day of Oct., 1884.
W. M. GINGLEY, [SEAL.]
Notary Public.

Com. expires Dec. 10th, 1885.

Endorsed on the back of which are the following:
No. 4812. U. S. circuit court. J. A. Field & Co. *vs.* Clements,

Eustis & Co., defendants. Replevin undertaking. Filed Oct. 2nd, 1884. A. S. Thomas, clerk. Peck, Johnson & McFarland, attorneys for plaintiff-.

Whereupon the defendant- next offered and read in evidence the amended answer of the defendants in said replevin action, which was in words and figures following, to wit:

In the Circuit Court of the United States for the District of Kansas.

J. A. FIELD and ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Plaintiffs,
versus
W. P. CLEMENT, M. B. CLEMENT, and CHARLES Eustis, Partners Doing Business under the Firm Name and Style of Clements, Eustis & Co., Defendants.
} Amended Answer.

Comes now the defendants and for their amended answer to the plaintiffs' petition herein say—

57 That they deny each and every allegation therein contained, except as hereinafter admitted to be true.

Second. Defendants, for further amended answer, say that they admit the execution and delivery of the promissory notes and chattel mortgage referred to and set out in the petition of plaintiffs to secure the payment of the purchase price of and for a certain Star cane mill No. 7, purchased by defendants from said plaintiffs, but defendants aver the facts to be that on and before the 22 day of June, 1883, the defendants were engaged in the raising of cane and the manufacture of sugar and molasses from said cane near the city of Sterling, Rice county, State of Kansas, and the plaintiffs were engaged in the manufacture of mills for the purpose of manufacturing sugar and molasses from said cane at and in the city of St. Louis, State of Missouri; that on or about said date the plaintiffs contracted with the defendants to manufacture for them a certain No. 7 Star cane mill, the main roller to be 24 inches and the lower roller 20 inches in diameter and three feet long, including bagasse carrier 16 feet long complete, reels, drawing chains, and 50 feet of carrier web*b*, with friction roller for a 50-feet cane-carrier, gearing to give speed of 25 feet per minute to cane travelling through rollers, engine making 100 revolutions per minute, with double back gearing suitable to attach direct to engine shaft, delivered on board the cars in St. Louis, State of Missouri, on or before the first day of August, 1883, for which the defendants agreed to pay said plaintiffs for said mill eighteen hundred and fifty dollars; five hundred dollars cash in hand, five hundred dollars due Nov. 1st, 1883, and eight hundred and fifty dollars due Nov. 1st, 1884, with six per cent interest per annum on the last note from date of shipment; said notes were secured by a chattel mortgage

58 on said mill, and which are the same notes and mortgage set out in the plaintiffs' petition herein.

Defendants further aver that the sale of said mill was made by said plaintiffs as aforesaid, who then and there falsely and fraudulently represented and warranted to the defendants said mill would do as good work as any mill for a similar purpose, and to crush and express the juice as thoroughly as any other mill of the same size and price, and to be of good material and well made, and to do as good work and as much of it as any other mill of any other manufacture, and to be as strong as any other mill of the same size, and that it would be as good a mill as any other mill made, and that plaintiffs would stand by and make the mill good in all respects as warranted, and that upon failure of said mill to perform as warranted upon notice they would make it operate and perform in accordance with said warranty, and failing so to do that they would replace said mill with a new one at their own expense and costs that would perform as warranted or refund the purchase-money.

Defendants further state that they did and performed all and singular the conditions of their contract on their part and paid said plaintiffs five hundred dollars, the cash payment on said mill, and executed and delivered the notes and mortgage in suit to said plaintiffs to secure the payment of the balance of the purchase-money for said mill, fixtures, and appurtenances, as by their said contract they obliged themselves to do.

Defendants further aver that said plaintiffs failed, neglected, and refused to perform their said contract; that they did not manufacture and ship said mill on the cars at the city of St. Louis, State of Missouri, on or before the 1st day of August, 1883, as they
59 had by their said contract bound themselves to do, but, in breach of their said contract, did not ship said mill from said city of St. Louis, Mo., until the 15th day of August, 1883, thereby depriving defendants from the use of said mill a period of fifteen days.

Defendants further aver that said plaintiffs failed, neglected, and refused to perform their said contract, but made breach thereof and of their said warranties therein contained, for that said mill did not do as good work as any other mill for similar purposes, but wholly failed to perform the purpose for which said plaintiffs sold said mill to defendants; nor did said mill crush and express the juice as thoroughly as any other mill of the same size and price, but, on the contrary, it failed to crush the cane or express the juice therefrom, but left nearly fifty per cent. of the juice unexpressed therefrom, which ought and could have been expressed therefrom if said mill had performed as it should have done and was warranted to do; nor was said mill constructed of good material or well made; nor did the same do as good work or as much of it as any mill of any other manufactory, but, on the contrary, it failed to do good work both in quantity and quality; nor was said mill as strong as other mills of the same size, but, on the contrary, the same was weak and unfit for the use for which plaintiffs sold and the defendants bought the same; nor was said mill as good as any other made, but, on the contrary, it was entirely worthless and of no value whatever; nor did said plaintiffs make said mill good, as by their

said contract they obligated themselves to do, but, on the contrary, notwithstanding the failure of said mill as warranted by said plaintiffs as aforesaid, they neglected and refused to make said mill operate and perform in accordance with their said warranty, and neglected and refused to replace said mill with a new mill, at their own costs and expenses, that would perform as warranted, though often requested so to do; nor have said plaintiffs refunded the purchase-money paid them for said mill by said defendants, though often requested so to do, and who possessed at the time full knowledge of the failure of said mill.

Defendants further aver that said plaintiffs by means of the premises aforesaid falsely and fraudulently deceived them, the said defendants, on the sale of said mill as aforesaid, by means whereof the said defendants, confiding in said warranties, used, operated, and employed said mill for the purpose of manufacturing sugar, syrup, and molasses at their works at the city of Sterling as aforesaid and the said mill, from its being so defectively and unmechanically made and constructed as aforesaid, broke and failed to perform the uses for which plaintiffs sold it to said defendants; and the said mill not having been manufactured and shipped on the 1st day of August, 1883, as contracted by plaintiffs as aforesaid, deprived the defendants of the use of said mill for the period of fifteen days; thereby defendants were greatly delayed in operating said mill and in manufacturing their sugar and molasses, and were accordingly deprived of divers large profits and gains, which they otherwise would have made from the earnings of said mill, and also thereby said defendants were forced and obligated to and necessarily did lay out and expend large sums of money, to wit, five hundred dollars, in and about making repairs to said mill, in procuring it to operate and perform the uses and purposes for which said plaintiffs, in accordance with their contract and warranties aforesaid, sold the same to defendants; thereby defendants were greatly delayed in operating said mill and manufacturing sugar and molasses, and in consequence thereof suffered great loss and were deprived of divers large profits and gains, and which they would have made from the earnings of said mill if the same had been performed as it should have done, as warranted by said plaintiffs; and also thereby said defendants suffered divers great losses and were deprived of divers large profits and gain- which they otherwise would have made from the earnings of said mill, because of its failure to perform and to express the juice from the cane as it ought to have done and was falsely represented and warranted to do by plaintiffs, and thereby the defendants sustained divers other losses and damages and were deprived of divers large profits and gain- which they otherwise would have made from said earnings of said mill, all and singular *the* the great sum of seven thousand dollars.

Defendants aver that because of the premises the said notes in suit and each of them and all the interest are fully paid, satisfied, and discharged, and defendants are not indebted to plaintiffs in any sum or amount whatever, and they have no right, interest, or title in or to the said mill because of said chattel mortgage or otherwise,

and are not the owners thereof nor are they entitled to nor should they have and recover possession thereof.

Third. Defendants, for further amended answer, say that before the commencement of said action the said plaintiffs sold and transferred the said note calling for five hundred dollars, given to said plaintiffs as payees therein by defendants, due Nov. 1st, 1883, and referred to and set out in plaintiffs' petition, to the State Savings Association of St. Louis, Mo., and that said State Savibgs Association has commenced a suit against said defendants for the collection of said note in said court, which said action is now pending and
62 undisposed of in said court, and that said plaintiffs have no right, title, or interest in said note, and that said other note for eight hundred and fifty dollars referred to and set out in plaintiffs' petition was not due at the time of the commencement of said suit; wherefore defendants have and are not in default in the payment of any debt due plaintiffs under their said chattel mortgage nor are they entitled to nor should they maintain this action to have and recover possession of said mill.

Fourth. The defendants for further action say that the consideration for the notes and mortgage set out and described in plaintiffs' said petition *were* for the purchase of the cane mill referred to in the plaintiffs' petition and as stated in the second count of defendants' amended answer, which is made a part hereof, and that said plaintiffs, at time of the sale of said mill to said defendants, fraudulently represented and warranted said mill to said defendants, fraudulently represented and warranted said mill to be constructed of good material, to perform well for the purposes for which it was manufactured and sold to defendants by plaintiffs, and of great value and utility; whereas said mill was at the time and is wholly worthless and of no value whatever.

Wherefore the consideration of the said notes and mortgage in suit have entirely failed and said plaintiffs have no right, title, or interest, nor are they entitled to the possession of said mill by virtue of said chattel mortgage or otherwise.

Defendants, having fully answered, ask judgment for the sum of seven thousand dollars damages—for the return of said property and damages for the taking thereof—judgment for costs and other proper relief.

JETMORE & SON,
Att'ys for Defendants.

63 Attached to which is the following:

J. A. FIELD & CO.
vs.
CLEMENTS, EUSTIS & CO.

TOPEKA, KAS., *June 1st*, 1885.

To the plaintiffs, J. A. Field & Co., or their attorneys, Peck, Johnson & McFarland:

You are hereby notified that the defendants, by counsel, will on

the first day of the term of said court or as soon thereafter as the same may be practicable ask leave of said court to file an amended answer, of which the annexed is a true copy, of which you will take due notice.

JETMORE & SON,
Att'ys for Defendants.

We acknowledge service of the above and foregoing notice this 1st day of June, A. D. 1885.

PECK, JOHNSON & McFARLAND,
Att'ys for Plaintiffs.

On the back of which is endorsed the following:
No. 4812. J. A. Field & Co., pl'ffs, *vs.* Clement, Eustis & Co., def'ts. Amended answer. Filed June 6th, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy. Jetmore & Son, att'ys for def'ts.

And thereupon said defendants introduced and read in evidence the amended reply of said plaintiffs to the amended answer of said defendants in said case No. 4812; which said amended reply was and is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Kansas.

J. A. FIELD & ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Plaintiffs,
vs.
W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of Clement, Eustis & Co., Defendants.
} Amended Reply.

And now come the said plaintiffs and for their amended reply to the answer of said defendants filed herein say:

1st. That they deny each, every, all, and singular the alle-
64 gations and averments in said answer contained and set forth, except wherein said answer admits allegations and averments contained in said petition.

2nd. That if it was ever agreed, as stated in said answer, that said mill and appliances should be manufactured and shipped on the cars in the city of St. Louis on the 1st day of August, 1883, it was subsequent to the date of said agreement and prior to said 1st day of August, 1883; further agreed between said plaintiffs and defendants that if said plaintiffs could not ship said mill on said first day of August that the same might be shipped as soon thereafter as said plaintiffs could do so; that said plaintiffs did ship said mill as soon as they could do so, and in fact as soon as defendants were ready for the same; that after said mill was shipped the same was received by and accepted by said defendants without making any claim for damages by reason of said pretended delay, and after having received the same the said defendants settled with said plain-

tiffs for the same by giving their notes therefor, the same being the notes mentioned in the petition, and did not then nor at any time prior to the commencement of this suit claim anything for damages by reason of said supposed delay, but on the contrary waived all right to demand or claim for damages therefor.

3rd. That said mill and appliances therewith connected fully filled the terms, conditions, and requirements of the warranty which said plaintiffs gave said defendants when they sold said mill and appliances; that said defendants never notified or informed said plaintiffs that said mill failed to perform as warranted, either immediately after one day's trial thereof, as by the terms of said warranty they were required to do if said mill did not so perform,
65 or afterwards or at any time; that said mill and appliances did operate according to the terms of said warranty during all the time required by said warranty and for a long time thereafter, and if at any time the same did not perform and so operate it was in consequence of the fault and negligence of said defendants and because said defendants placed an insufficient and improper foundation under the same, and because said defendants, without the consent or knowledge of said plaintiff-, changed and altered said mill and appliances, and because said defendants did not operate and adjust the same properly *and did not operate and adjust the same properly* and did not operate and adjust the same according to directions and not in consequence of the fault of the said mill or appliances or because the same did not fully fill the terms, requirements, and conditions of said warranty.

PECK, JOHNSON & McFARLAND,
Attorneys for Plaintiffs.

Endorsed: No. 4812. U. S. cir. court. J. A. Field & Co., plaintiffs, *vs.* Clement & Eustis & Co., defendants. Amended reply. Filed June 6th, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy. Peck, Johnson & McFarland, att'ys for plaintiffs.

Journal L.

Circuit Court of the United States, District of Kansas, Monday, June 15th, 1885, June Term, 1885.

J. A. FIELD & Co.
vs.
CLEMENT, EUSTIS & Co. } 4812.

Now come the plaintiffs herein, by Peck, Johnson and McFarland, their attorneys, and the defendants, by Jetmore & Son, their attorneys, and to try the issues joined come a jury, to wit, Charles A. Wright, D. F. Johnson, John C. Lynch, W. S. Angell, Jacob
66 Rhodenhouse, Robert Samuels, J. T. Lecompt, August Falk, M. A. Patterson, W. M. Twine, T. J. Trusty, and Henry Harris, twelve good and lawful men of the body of the district of Kansas, who *being* duly empanelled and sworn to well and truly try the matters submitted to them in this action and a true verdict give

according to the law and the evidence; and thereupon the trial of this cause is proceeded with, and, not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein and the further hearing postponed until to-morrow.

Said case was proceeded with from day to day until and including June 19th, 1885, on which day a verdict was rendered and a final judgment upon said verdict was rendered, as hereinafter shown.

Whereupon the defendants offered and read in evidence the instructions of law given to the jury on the trial of said replevin suit, which are in words and figures following, to wit:

J. A. FIELD & Co.
vs.
CLEMENT & EUSTIS & Co.

The controversy in this case is about the right of possession of the cane mill in question.

The plaintiffs Field & Co. claim the right of possession under the chattel mortgage given by the defendants Clements & Co. to secure the balance of the purchase money.

The mortgage provided that if the def'ts made default in the payment of the money or any part thereof when it became due, then the plaintiffs should have the right to take possession of the mill and sell the same to pay their debt.

The $500 note which fell due November 1st, 1883, was not
67 paid and the pl'ffs demanded the mill, and on defendants' refusing to give it up plaintiffs commenced this suit in replevin for the property.

The def'ts in effect deny that they are in default. They do not claim that they actually paid the $500 note, but they claim that by reason of the breach of the contract, sale, and warranty of the mill by Field & Co. that the defendants sustained damages sufficient to cover and cancel their debt on the property.

This presents the main question for your consideration—*i. e.*, Was there a breach of the contract by Field & Co.?

The warranty of the machine, or the part material to this case, reads as follows:

"Subject to the following warranty.

We warrant the Star cane mill and evaporator, centrifugals, and bagasse burners to do as good work as any other mill or evaporator, centrifugals, and bagasse burners for a similar purpose, and to crush and express as fast or evaporate the juice as thoroughly as any other mill or evaporator of the same size and price, to swing out the malado or burn bagasse as well, and to be of good material and well made. If the mill or evaporator or other articles named fail to operate as above, immediate notice must be given to us or to our agent who sold it and time sufficient allowed to send some one from the factory to operate it. If the mill or evaporator fails then to perform as above described it will be taken back and a new one furnish- that will perform as warranted, free of costs or expense to the purchaser

or the money refunded. If, however, it is found that the fault was in consequence of the mill or evaporator or other articles not having been operated according to directions, and from no fault in the mill or evaporator or other articles, then the purchaser shall
68 pay the travelling expenses of the party sent to operate it and the machine shall be considered as filling the warranty.

It is hereby further agreed that one day shall be deemed sufficient for a trial, and if the mill or evaporator or other articles fail to perform as warranted the purchaser shall be obliged to give notice at once. The absence of any information after said trial shall be conclusive evidence that the mill or evaporator is accepted; no mill or evaporator to be returned until the conditions of the warranty are fully complied with."

Modified by the following letter of J. A. Field & Co. to defendants:

"St. Louis, Mo., *June 25th*, 1883.

W. P. Clement, Sterling, Kansas:

Yours of 23rd received and noted. When I read a part of our printed warranties to you I had no thought of concealing or misleading you. We do not expect to take any advantage of any technical wording in the warrantee and should not expect to confine the limits of warrantee to one day's use. Those items in warrantee were intended for small mills in the hands of strangers who have no experience and were for a protection against unprincipled persons who are ready to take advantage of anything necessary and throw mills back on our hands without notice after they have their work done.

You can consider the warrantee so modified as to cover the fact that it is warranted to do as good work and as much of it as any mill of any other manufactory and to be as strong as any other mill of same size. If it would be necessary to send a man to your place for any reason we would not be liable to ask you to pay our
69 bill of expense. We understand we are dealing with experienced men and we shall not have to look after the mill unless in case of defect, and that will be at our expense.

You shall have as good a mill as any one makes, and we will stand by it. We can't afford to do anything else.

Yours, J. A. FIELD & CO."

This is the contract between these parties as to the quality and capability of the mill. The pl'ffs were to ship the mill at St. Louis by the 1st day of August.

The law in general permits parties to make their own contracts, and each part- is bound to perform his contract unless released or prevented by the other party, and for a failure to do so must respond in damages.

The pl'ffs did not ship the mill until Aug. 14th, but they say the reason for that delay was that def'ts failed to make the cash payment of $500 at the time agreed on. Now, the plaintiffs were not bound under the contract to commence the work on the mill until that payment was made, and whatever time they lost by that

delay of payment, if it delayed the making of the mill, should be added to their time for shipment.

There seems to have been some delay in getting the mill set up after it arrived at Sterling. There seems to have — some fault in the papers, which took a little time to correct, but does not seem to have been the fault of the pl'ffs.

There was also about three days' delay in starting the mill for the want of a proper shaft. The shaft sent from St. Louis with the mill was too short. There is a controversy as to who is to blame for that mistake. Each party charges default on the other party, and you must decide it. If it was the plaintiffs' fault they should pay the damages for that delay; if it was not their fault they should not pay it.

70 From and after the middle of August time was valuable to the def'ts, as their cane was ready to work, and if they were delayed in commencing their work by default of plaintiffs in not shipping the mill and proper appurtenances, of course the plaintiffs must make it good to them.

But, if the defendants accepted the shipment of Aug. 14th without objection or claim for damages and gave plaintiffs to understand that they accepted it as a sufficient compliance as to the date of the shipment, the def'ts cannot now come in and set up damages for that delay.

So much as to the claim for damages for delay.

The next question is the great bone of contention: Should these plaintiffs be charged with damages on a breach of their warranty?

The guarantee provided, "If the mill fails," &c.

Now, under the contract, the def'ts were required to give plaintiffs immediate notice of any failure of the mill to do good work, and plaintiffs were to have time to send some one from their factory to operate it, so you will see that plaintiff- were not put in fault until after the notice from the defendants.

It appears from plaintiffs' letter that they did not mean to confine the defendants to a test of the mill for one day, but they were to have some more time. Just how much more is not clear from the evidence, but Mr. Field says four or five days and Mr. Clements denies any specific time.

But, be that as it may, the plaintiffs were not in fault until they were notified of trouble about the mill. Indeed, they had good reason to believe, from the defendants' letter- of Aug. 31st and September 7th, the last letter written eight days after starting the mill, that it was giving good satisfaction and really they

71 could rest easy until a contrary report was received by them.

It seems that they received a telegram from defendants Aug. 19th saying, Send new scraper and man to adjust it; mill standing idle, or words to that effect. Now, this telegram did not contradict the favorable report of Sept. 7th, but might well lead them to believe the mill had stopped by reason of the broken scraper, and not until about the 25th of Sept. did plaintiffs receive information of dissatisfaction with the operation of the mill, and that came by

letter in the hands of Haener, who had gone out to put in the scraper.

On the 25th of Sept. the plaintiffs wrote, in answer to that letter, that their warranty had been made good, and whatever they *done* after that to make the mill work was a matter of grace and not a legal obligation.

And, in consideration of the lapse of time and the former good report by the defendants about the mill, the plaintiffs' position had much force and reason in it, and I am not sure but it is my duty to say to you, as a question of law, that defendants are estopped to question the warranty after those occurrences and lapse of time; but as there was some further time given by plaintiffs' letter, and that is not very definite, I will leave it to you to determine if this notice could be said to have been given the plaintiffs within a reasonable time. If it was not, defendants cannot question the warranty or claim damages for its breach, and it is in such case immaterial whether the mill worked well or otherwise.

But you will find that notice was in time. These plaintiffs were to have time to send a man out from St. Louis and a reasonable time after he arrived there to operate the mill and cure any defect in its operation, and if it was made to run properly in a
72 reasonable time thereafter it was a compliance with the warranty and plaintiffs would not be liable for damages in that respect.

Whatever may have been the fault or difficulties, whether in the mill or the foundation, it is agreed that it got to doing satisfactory work by the 10th of Oct., so the only period of time in any event that you have to consider in connection with the plaintiffs' liability for damages on the warranty lies somewhere between Sept. 25th and October 10th, and out of that period the plaintiffs were to be allowed time to send a man out—reasonable time for him to get the mill in operation. If you find the notice was in time and after making such allowance there was left some days in which the mill failed to do good work through the fault of the mill itself and not the foundation or the persons operating the same, then you are to consider and determine what damages the defendants sustained by reason thereof and charge the plaintiffs with such damages.

If, however, the trouble arose from the fault of the construction or the material of the foundation or the fault of the def'ts' employees in operating the mill and not in the mill itself, then plaintiffs would not be liable for the damages. (See in brackets, next page.)

Rule of Damages.

The defendants' damages would be, if entitled to damages, the whole of the cane lost by the delay caused by plaintiffs' fault and failure of the mill to work up to its capacity, and also the loss of juice during that time caused by the fault of the mill in not properly pressing it from the cane and any expenses incurred in repairs, etc.

And should you find damages for defendants and that such
73 damages equalled or exceeded the entire debt due on the mill, then you will find for the defendants.

If you find damages but they do not equal plaintiffs' debt, then you will find for plaintiffs and state the value of plaintiffs' interest in the mill, which would be their debt, and interest, less the damages.

Burden of proof of a breach of warranty on defendants.

Form of verdict.

[The plaintiffs undertook to furnish a mill that would do as good work as any other of the size and price, etc. Of course, the guarantee contemplates and the law requires that in testing the merits of the mill it must be properly set up and fairly operated. If it then failed to do as good work as other mills it did not fill the contract, but if it did that was all that was required of it.] (See former page).

Endorsed: Field & Co. *vs.* Clements & Co. Charge. Filed June 19th, 1885. A. S. Thomas, clerk.

Whereupon the defendants in this action next offered and read in evidence the final judgment in said original replevin action, which is in words and figures following, to wit:

74 FRIDAY, *June 19th*, 1885.

J. A. FIELD and ALEX. MAGEE, Partners as J. A. Field & Co., Plaintiffs,
vs.
W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTIS, Partners as Clements, Eustis & Co., Defendants. } No. 4812.

Now come the parties herein, same as on yesterday, and, the jurors herein empannelled being called and all being present, the trial of this cause is proceeded with, and the jurors, having heard the evidence, arguments of counsel, and instructions of the court, retire under the charge of a sworn bailiff for deliberation and afterwards return into open court, under the charge of said sworn bailiff, and render their verdict herein, which is in the words and figures following, to wit:

J. A. FIELD & Co.
vs.
CLEMENT, EUSTIS & Co. } 4812.

We, the jury in said entitled action, find for the plaintiffs that at the time of the commencement of this action the said defendants did wrongfully detain the goods and chattels in the plaintiffs' petition described from the plaintiffs, and that said property was at that time of the value of $1,200.00, and also that the value of the plaintiffs' special interest therein at that time was the sum of $1,151.20.

CHAS. A. WRIGHT, *Foreman.*

It is therefore considered, ordered, and adjudged by the court that the said plaintiffs do have the possession of the specific personal property in said petition mentioned and described, to wit, one Star cane mill No. 7; main roll 24 inches in diameter; lower rollers 20 inches clear in diameter; all rolls three (3) feet long, including double-gearing cane-carriers and bagasse-carriers, complete; said mill was made by J. A. Field & Co., St. Louis, and that said plaintiffs do have and recover of and from said defendants the possession of said specific personal property, and that the said defendants do deliver to said plaintiffs said specific personal property, the same being now in the possession of said defendants.

And it is further considered, ordered, and adjudged by the court that in case a delivery of said specific personal property cannot be had that said plaintiffs do have and recover of and from the said defendants the said sum of $1,151.20, the amount of said plaintiffs' special interest in said property so as aforesaid found by said verdict, and that said plaintiffs do have and recover of and from the said defendants the costs of this action, taxed at — dollars, and hereof let execution issue.

And thereupon said defendants introduced and read in evidence the motion for a new trial filed by the defendants in said replevin action, case No. 4812; which said motion for new trial was in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Kansas.

J. A. FIELD & Co.
vs.
CLEMENT, EUSTIS & Co.

Come now the defendants and move the court to set aside the verdict and grant them, the defendants, a new trial for reasons following, to wit:

1st. That the verdict of the jury is contrary to the law.

2nd. That the court erred in instructing the jury in the law.

3rd. That the verdict of the jury is contrary to the law.

4th. That the verdict of the jury is against the law and the evidence.

5th. Error of law during the trial and excepted to at the time by the defendants.

6th. The court erred in excluding material and proper testimony and evidence offered by defendants on the trial of said action.

7th. That the court erred in admitting irrelevant and illegal evidence on the part of the plaintiffs and excepted to at the time by the defendants.

JETMORE & SON,
Att'ys for Defendants.

Endorsed: No. 4812. J. A. Field & Co. *vs.* Clement, Eustis & Co. Motion for new trial. Filed June 19th, 1885. A. S. Thomas, clerk.

And it also appeared to the court that said motion for a new trial was duly overruled by the court, and the judgment of said court overruling said motion for a new trial was duly entered of record.

And thereupon the defendants introduced in evidence the action and decision of the court in overruling said motion for a new trial in said replevin action No. 4812, which is in words and figures following, to wit:

U. S. Cir. Court, Dist. of Kansas.

J. A. FIELD & Co.
vs.
CLEMENTS, EUSTIS & Co.

On motion for new trial.

77 There are two questions presented on the motion for a new trial, that under the pleadings, if urged at the time of the trial, would have had much force.

The first is whether the failure to notice the cash payment by the defendants at the time named in the order for the mill is *is* so pleaded in the plaintiffs' reply as to entitle them to avail themselves of it as an excuse for the delay in making and shipping the mill.

The answer of the defendants aver- that they "performed all and singular the conditions of their part." The plaintiffs in their reply have a general denial, and also special averments, &c. Now, it is a close and somewhat doubtful question whether the general denial in the reply entitled plaintiffs to offer that evidence.

But the question was not presented on the trial, and the evidence went in without objection, and it is now too late to make the objection.

The other question is the instruction to the jury that unless the defendants' damages equalled or exceeded the whole debt of the plaintiffs that they should find the right of possession of the property in the plaintiffs with the statement of amount due. As the action was commenced before the $850 note was due, this instruction was not correct, but it was not challenged at the time; and inasmuch as the large note was long past due at the time of the trial, while the court saw the difficulty, it rather assumed that defendants would prefer to have the whole controversy determined in that action, rather than on a somewhat technical point necessitate the probability of another contest over the other note.

78 But it seems to me that from the evidence it was an error that did not prejudice the defendants, for on making computation of the amount of the large note and all interest thereon it falls short of the verdict about $200, showing clearly that the jury fixed defendants' damages as lacking about that sum of cancelling the $500 note.

As the court told the jury, the main controversy was about the merits and demerits of the mill as constructed; whether it filled the plaintiffs' warranty. The case was thoroughly tried on both sides

and a great deal of expert and other testimony offered. The question of damages for a few days' delay, more or less, as also the question of plaintiffs' right to bring in his whole debt or only the $500 note, was overshadowed by the main controversy, and it seems to me the verdict is a fair and just one under all the evidence and that no good can come to either party by going over this controversy again. The motion is overruled.

Endorsed: No. 4812. Field & Co. *vs.* Clements, Eustis & Co. Decision on motion for new trial. Filed July 31st, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

Further, the defendant showed to the court—

That the mill and property sought to be replevined in said case No. 4812 was the same mill and property mentioned in the plaintiffs' petition herein; that the notes and chattel mortgage set out in the petition in said case No. 4812 are the same notes and mortgage mentioned in the petition herein; that the causes of action and claims for damages sued for in this action are the same causes of action and claims for damages that were set up in the answer in said case No. 4812; that the said case No. 4812 was tried upon its merits and submitted to a jury upon the evidence
79 and instructions of the court; that upon the trial of said case No. 4812, after the plaintiffs had introduced the said notes and chattel mortgage and shown a *prima facie* right to recover in said action, the defendants in said action introduced a large amount of evidence tending to establish their said claims for damages set up in said answer; which evidence was admitted by the court and allowed to go to the jury over the objection of said plaintiffs, the court holding that the said defendants were entitled to offset the amount of said notes and interest thereon offered in evidence to secure which the said chattel mortgage was given by any damages set up in their said answer which they could establish, but would not be entitled to a judgment over against said plaintiffs in case the jury should find that the said damages exceeded the amount of the said notes and interest; but in case said damages equalled or exceeded the amount of said notes and interest, then said defendants would be entitled to a judgment against said plaintiffs for costs, but no more, and the court also so instructed the jury, as appears from the instructions of the court to the jury herein set out; that after said defendants had introduced said evidence, tending to establish their said damages, said plaintiffs introduced a large amount of evidence tending to disprove said damages; that the evidence upon said claims for damages was the only evidence introduced by said defendants in said action tending in any way to show that the value of said plaintiffs' special interest in the property, to recover which said action was brought, was not equal to the amount of the said notes and interest set out in the petition in said action; that no evidence offered by said defendants tending to establish said
80 claims for damages or the amount thereof was ruled out by the court or excluded from the jury because of said ruling of

said court that said defendants would not be entitled to a judgment against said plaintiffs for the balance over in case the jury found that the said damages exceeded the amount of the said notes and interest; but said question of damages was tried and submitted to the jury and determined as herein stated; and, further, that the plaintiffs in this action were the defendants in the said case No. 4812, and that the defendants in this action were the plaintiffs in said case No. 4812.

The above was all the evidence offered in the case by either party on said plea or fourth defense of defendants herein and which was all the evidence introduced by either of the parties herein.

Whereupon the court, after hearing argument of counsel and being fully advised in the premises, doth find for the defendants, and that plaintiffs have had a former recover- against the defendants herein upon the cause of action set out and tried in the aforesaid action of replevin, and that the proceedings and judgment therein are a complete bar to the plaintiffs' cause of action herein.

Whereupon it is considered by the court that the defendants have and recover of and from the plaintiffs their costs in this behalf laid out and expended, taxed at $—, and hereof have execution; to which action and decision of the court the plaintiffs at the time duly excepted and except.

Whereupon the plaintiffs at the time and within three days from the rendition of said judgment herein duly filed their motion for a new trial herein; which motion is in words and figures following, to wit:

81 In the Circuit Court of the United States for the District of Kansas.

CLEMENTS, EUSTIS & Co., Plaintiffs,
vs.
J. A. FIELD & Co., Defendants. } Case No. 5234.

Come now the plaintiffs in above-entitled action and move the court to set aside the judgment in favor of the defendants and grant the plaintiffs a new trial herein for the following reasons, to wit:

1st. The judgment in favor of the defendants sustaining their defense of "*res judicata*" as to plaintiffs' cause of action is not sustained by sufficient evidence.

2nd. That said judgment is contrary to law.

3rd. That said judgment is contrary to law and the weight of the evidence.

4th. Error of law occurring at the trial and excepted to by the plaintiffs at the time.

5th. The said judgment is for the wrong party. The same should have been rendered in favor of the plaintiffs herein.

Wherefore plaintiffs pray a new trial.

JETMORE & SON,
Attorneys for Pl'ffs.

Endorsed: No. 5234. Clement, Eustis & Co. *vs.* J. A. Field & Co., defendants. Motion for new trial by plaintiffs. Filed Dec. 7th, 1887. A. S. Thomas, clerk. Jetmore & Son, att'ys for plaintiffs.

82 The above motion came on regularly for hearing, is taken up by the parties and submitted to the consideration of the court. The court, after being fully advised, doth overrule said motion; to which ruling and decision of the court the plaintiffs at the time duly excepted and except.

Whereupon plaintiffs during said term of court and within the time provided by law ask that this their bill of exceptions be duly signed and sealed by the court and made a part of the record herein; which is accordingly done this 7th day of December, 1887.

[SEAL.] C. G. FOSTER,
U. S. Dis'ct Judge.

Endorsed: No. 5234. Clement, Eustis & Co. *vs.* J. A. Fields & Co. Bill of exceptions. Filed now for and as of Dec. 7, 1887, this Jan. 14, 1888. A. S. Thomas, clerk.

83 Supreme Court of the United States.

W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTIS, Partners Doing Business under the Firm Name and Style of "Clement, Eustis & Co.," Plaintiffs,

vs.

J. A. FIELD and ALEX. MAGEE, Partners Doing Business under the Firm Name and Style of J. A. Field & Co., Defendants.

Know all men by these presents that we, W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name and style of "Clement, Eustis & Co.," and J. Hanna, of Rice county, State of Kansas, are held and firmly bound unto J. A. Field and Alex. Magee, partners doing business under the firm name and style of J. A. Field & Co., of St. Louis, Mo., in the sum of five hundred dollars, to be paid to the said J. A. Field & Co., their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this the 8th day of August, 1889.

Whereas the above-named W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name and style of Clement, Eustis & Co., hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Kansas: Now, therefore, the condition of this obligation is such that if the above-named W. P. Clement, M. B. Clement, and Charles Eustis, partners as aforesaid, shall

prosecute their said writ of error to effect, and answer all costs
84 if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CLEMENT, EUSTIS & CO. [L. S.]
W. P. CLEMENT. [L. S.]
M. B. CLEMENT. [L. S.]
J. HANNA. [L. S.]

Sealed and delivered in the presence of—
J. N. McGEE, *Witness.*

STATE OF KANSAS, } ss:
Rice County, }

J. Hanna, of lawful age, upon his oath says that — is the surety on the above bond, and that he is worth, over and above all debts, liabilities, and exemptions, over one thousand dollars.

J. HANNA.

Subscribed and sworn to before me this 8th day of August, 1889.
[SEAL.] J. N. McGEE,
Notary Public, Rice County, State of Kansas.

My com. expires Jan'y 3rd, 1893.

Bond approved Aug. 27, 1889.

DAVID J. BREWER,
Circuit Judge.

85 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings had in said court in the case of Clement, Eustis & Co. *vs.* J. A. Field & Co., No. 5254, as the same remains of record and on file in my office.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 27th day of August, A. D. 1889.
GEO. F. SHARITT, *Clerk.*

86 UNITED STATES OF AMERICA, ss:

To J. A. Field and Alex. Magee, partners doing business under the firm name and style of J. A. Field & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of October next, the same being the 14th day thereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein W. P. Clement, M. B. Clement, and Charles Eustis, partners doing

business under the firm name and style of Clement, Eustis & Co., are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. W. Fuller, Chief Justice of said Supreme Court of the United States, this 27 day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

DAVID J. BREWER,
Circuit Judge.

I hereby acknowledge service of the above citation by receiving a true copy thereof this — day of ——, 1889.

——— ———,
Att'y for the Defendants, J. A. Field & Co.

[Endorsed:] Clement, Eustis & Co. *vs.* J. A. Field & Co. Citation.

87 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, J. W. Emerson, *who*, upon oath says that I am the United States marshal for the eastern district of the State of Missouri, and that as such I did, on the 29th day of August, 1889, personally serve the within writ of citation on J. A. Field in person and on a member of the family of said Alexander Magee at his usual place of abode (said member being over sixteen years old), at the said city of St. Louis, by delivering to each of them a true copy of the annexed writ of citation; said Alex. Magee not found in person.

J. W. EMERSON,
U. S. Marshal, E. D. Mo.

Subscribed and sworn to before me this the 29th day of August, 1889.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

A. P. SELBY,
Clerk of the United States Circuit Court, Eastern Division, Eastern Judicial District of Mo.,
By GEO. F. HAID, *Deputy.*

2 services, $2 ea.	$4 00
2 miles	12
	$4 12

EMERSON,
U. S. Marshal, St. Louis.

88 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name and style of Clement, Eustis & Co., plaintiffs, *vs.* J. A. Field and Alex. Magee, partners doing business under the firm name and style of J. A. Field & Co., defendants, a manifest error hath happened, to the great damage of the said Clement, Eustis & Company, plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 31st day of July, A. D. 1889.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed:
C. G. FOSTER, *Judge.*

[Endorsed:] No. 5234. W. P. Clement, M. B. Clement, and Charles Eustis, partners by firm name & style of Clement, Eustis & Co., *vs.* J. A. Field and Alex. Magee, partners by firm name and style of J. A. Field & Co. Writ of error. Filed July 31, 1889. Geo. F. Sharitt, clerk.

Endorsed on cover: Case No. 13,665. Kansas C. C. U. S. No. 111. W. P. Clement, M. B. Clement, & Charles Eustis, partners doing business under the firm name & style of Clement, Eustis & Company, plaintiff- in error, *vs.* J. A. Fields & Alexander Magee, partners doing business under the firm name & style of J. A. Field & Company. Filed September 30, 1889.

14,728,467

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No. 13,665.

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1892.

TERM No., 111.

W. P. CLEMENT, M. B. CLEMENT, AND CHARLES EUSTIS, PARTNERS DOING BUSINESS UNDER THE FIRM-NAME AND STYLE OF CLEMENT, EUSTIS & COMPANY, *Plaintiffs in Error,*

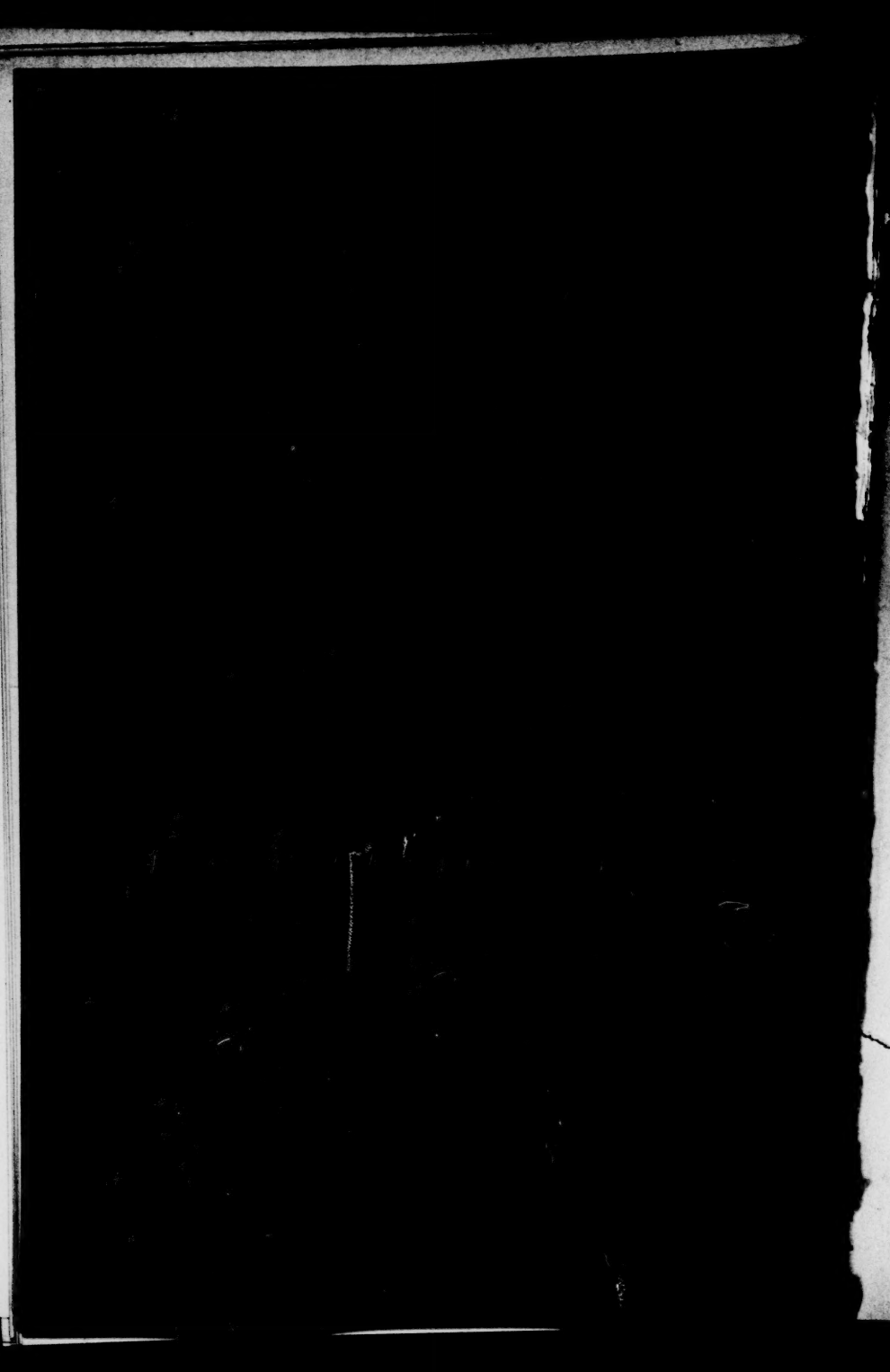
vs.

J. A. FIELD AND ALEXANDER MAGEE, PARTNERS DOING BUSINESS UNDER THE FIRM-NAME AND STYLE OF J. A. FIELD & COMPANY,
Defendants in Error.

STATEMENT, AND BRIEF OF THE ARGUMENT BY PLAINTIFFS IN ERROR.

A. B. JETMORE,
A. P. JETMORE,
Counsel for Plaintiffs in Error.

THE HAMILTON PRINTING COMPANY, PRINTERS & BINDERS, TOPEKA.



IN THE SUPREME COURT

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W. P. CLEMENT, M. B. CLEMENT, AND CHARLES EUSTIS, PARTNERS DOING BUSINESS UNDER THE FIRM-NAME AND STYLE OF CLEMENT, EUSTIS & COMPANY, *Plaintiffs in Error*,

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Defendants in Error.

Case No. 13,665.

STATEMENT, AND BRIEF OF THE ARGUMENT BY PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

THIS was an action brought by the plaintiffs in error (as plaintiffs below) against the defendants in error (as defendants below), by attachment, on August 10, 1885, in the district

court of the twentieth judicial district of the State of Kansas, sitting in and for the county of Rice, for breach of contract and of warranty, in the sale of a certain No. 7 Star cane mill, of the dimensions and character as set out in their petition. The plaintiffs placed their damages at $10,000, and demanded judgment for that amount. (Record, 1–7.) The defendants answered in six counts. (Record, 19–26.) The case was removed on application of the defendants below to the Circuit Court of the United States for the District of Kansas, where it was tried on the fourth defense only of the defendants' answer, the same being a plea of former recovery, and which is in words and figures following:

"*Fourth.* That under and by virtue of the terms and conditions of the chattel mortgage given to secure the payment of the two (2) notes of $850, and $500, respectively, and the interest thereon, mentioned in said plaintiffs' petition, the said defendants, on the 1st day of October, 1884, became and were entitled to the immediate possession of said mill and appliances; and that afterwards, on the 2d day of October, 1884, the said defendants brought an action in replevin against the said plaintiffs, in the Circuit Court of the United States for the District of Kansas, to recover the possession of said mill and appliances, alleging that they were entitled to the possession thereof by virtue of said chattel mortgage and the breach of the conditions thereof, and alleging that their interest in said mill and appliances was the amount of said two notes of $850, and $500, respectively, and the interest thereon, amounting then in the aggregate to the sum of about $1,450; that said plaintiffs appeared in said action and filed their answer therein, alleging that the said defendants had no interest in said mill and that nothing was due on account of said notes, for the reason that said defendants were indebted to them in damages for and on account of the matters and things set out in the petition herein and as the cause of action sued upon herein in a sum greater than the amount of said notes and interest, and asking to have damages set off against said notes and interest, and that they might have judgment for balance; that said action of replevin was duly tried upon its merits and before said court and a jury, and a verdict returned therein by the jury, finding that at the time of the commencement of said replevin action the said plain-

tiffs were entitled to the possession of said mill and appliances, and that at said time the value of their interest therein was $1,151.20; and that afterwards, and on the 19th day of June, 1885, a judgment was duly rendered upon said verdict, and in accordance therewith, by reason whereof said plaintiffs have had a former recovery against the said defendants upon the cause of action set out in the petition and sued on herein, for the sum of $250." (Record, 21, 22.)

The plaintiffs' reply to the defendants' plea, as above set forth, is in words and figures following:

"*Fourth.* Plaintiffs admit that the defendants brought an action in replevin in the United States Circuit Court for the District of Kansas, to recover the possession of said mill and appurtenances under a chattel mortgage, as averred in the fourth count of their said answer; plaintiffs also admit that they appeared to said action and set up the defense to said action as therein alleged; but plaintiffs aver the facts to be, after they had set up their said defense claiming damages for breach of said warranty and said contract set out in plaintiffs' petition herein, and sought to recover judgment thereon for their damages by them sustained under the breaches of said contract and warranty therein contained, and which said defense was, upon the defendants' motion to said court, ruled out from the record of said court, and the plaintiffs were not permitted to make said defense nor recover their damages in said suit of replevin, and that said court held, and so stated in open court, that said action in replevin was purely a possessory action, and that said plaintiffs, as defendants therein, could not recover for any damages they may have sustained in consequence of the breaches of said warranties, and that the only way which they could recover redress therefor would be by an action by them brought upon said contract therefor in damages; wherefore said damages were not adjusted in said replevin action nor adjudicated therein, nor did nor could plaintiffs recover any damages therein in $250, or any other sum, nor was plaintiffs' cause of action herein adjudicated in said action." (Record, 37, 38.)

The record of the trial of the action at bar recites, among other things, the following:

"Be it remembered, that on the 7th day of December, 1887, the same being a regular judicial day of the November term, 1887, of the Circuit Court of the United States in and for the District of Kansas, held at the city of Topeka, in said

State, the above action came on regularly for trial, the plaintiffs appearing by Jetmore & Son, their attorneys of record, and the defendants appearing by J. D. McFarland, Esq., their attorney of record, and by their stipulation in writing, filed with the clerk of said court, signed by the respective attorneys of record of the parties, the parties waived a jury in said case; which stipulation is in the words and figures following, to wit: (Record, 43.)

. . . . . .

"And thereupon the plea or fourth defense of said defendants set out in their answer, to wit, the plea or defense that there had been a former adjudication and recovery against said defendants upon the cause of action set out in the petition herein and sued for in this action, was heard and submitted to the court upon said plea or fourth defense in said answer and the evidence introduced in support thereof for the decision of the court upon the matters presented by said plea or fourth defense in said answer.

"The defendants, in support of said plea and issues on their part, introduced the following testimony, to wit:

"Whereupon the defendants offered and read in evidence the original papers and files, consisting of petition and præcipe, affidavit for replevin and bond, amended answer, amended reply, the instructions of the court, the judgment, motion for new trial, and decision of court overruling motion for new trial in the replevin action, case No. 4812, filed and begun October 2, 1884, in the Circuit Court of the United States for the District of Kansas, wherein J. A. Field and Alex. Magee, partners doing business under the firm-name and style of J. A. Field & Co., were plaintiffs, and W. P. Clement, M. B. Clement, and Charles Eustis, doing business under the firm-name and style of Clement, Eustis & Co., were defendants, which, together with all indorsements thereon, are in words and figures following, to wit." (Record, 44.)

(The several instruments of evidence are set out in full in Record, 45 to 83, inclusive.)

In said replevin action the court instructed the jury, among other things, as follows:

"The defendants, in effect, deny that they are in default. They do not claim that they actually paid the $500 note, but they claim that, by reason of the breach of the contract, sale and warranty of the mill by Field & Co., that the defendants

sustained damages sufficient to cover and cancel their debt on the property." (Record, 67.)

. . . . . .

"And should you find damages for defendants, and that such damages equaled or exceeded the entire debt due on the mill, then you will find for the defendants. If you find damages, but they do not equal plaintiffs' debt, then you will find for plaintiffs, and state the value of plaintiffs' interest in the mill, which would be their debt and interest, less the damages." (Record, 73.)

The defendants showed to the court, among other things—

. . . . . .

"That the said defendants were entitled to offset the amount of said notes and interest thereon offered in evidence, to secure which the said chattel mortgage was given, by any damages set up in their said answer which they could establish, *but would not be entitled to a judgment over against said plaintiffs* in case the jury should find that said damages exceeded the amount of said notes and interest; but in case said damages equaled or exceeded the amount of said notes and interest, then said defendants would be entitled to a judgment against said plaintiffs for costs, but no more. (Record, 79.)

. . . . . .

The record further shows:

"The above was all the evidence offered in the case by either party on said plea or fourth defense of the defendants herein, and which was all the evidence introduced by either of the parties herein.

"Whereupon the court, after hearing argument of counsel, and being fully advised in the premises, doth find for the defendants, and that plaintiffs have had a former recovery against the defendants herein upon the cause of action set out and tried in the aforesaid action of replevin, and that the proceedings and judgment therein are a *complete bar* to the plaintiffs' cause of action herein.

"Whereupon it is considered by the court, that the defendants have and recover of and from the plaintiffs their costs in this behalf laid out and expended, taxed at $——, and hereof have execution; to which action and decision of the court the plaintiffs at the time duly excepted and except.

"Whereupon the plaintiffs, at the time and within three days from the rendition of said judgment herein, duly filed

their motion for a new trial; which motion is in words and figures following, to wit:

. . . . . .

"The above motion came on regularly for hearing, is taken up by the parties, and submitted to the consideration of the court. The court, after being fully advised, doth overrule said motion; to which ruling and decision of the court the plaintiffs at the time duly excepted and except.

"Whereupon plaintiffs, during said term of said court, and within the time provided by law, ask that this their bill of exceptions be duly signed and sealed by the court, and made a part of the record herein; which is accordingly done, this 7th day of December, 1887. C. G. FOSTER,

[SEAL.] *U. S. District Judge.*"

(Record, 80–83.)

SPECIFICATION OF THE ERRORS RELIED UPON BY PLAINTIFFS IN ERROR.

FIRST: *Error of the court in rendering judgment in favor of the defendants below, upon their plea of former recovery under the fourth defense of their answer, and against the plaintiffs in error.*

SECOND: *Error of the court in rendering judgment in favor of the defendants below and against the plaintiffs in error.*

BRIEF OF THE ARGUMENT.

The evidence offered by the defendants below upon their plea of former recovery, under the fourth defense of their answer, constitutes no bar to the right of recovery of the plaintiffs in error. The most that can be claimed, if anything, is, that it constitutes only a *partial* bar.

Spencer v. Dearth, 43 Vt. 105.

The rule of *res adjudicata* is, that if a fact has been once *directly* tried and determined by a court of competent jurisdiction, the same parties cannot properly be again allowed

to contest the same matters, either in that court or any other.

Wells's Res Adjudicata, §§ 4, 12, 13.
Holcomb v. Phelps, 16 Conn. 131.
Johnson v. White, 13 S. & M. 587.

But the rule does not apply, as in the case at bar, to matters which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the judgment.

Hopkins v. Lee, 6 Wheat. 109.
2 Smith's Leading Cases (6th ed.), 648, 649, 792, 794.
1 Greenleaf's Evidence, § 528.
Story's Conflict of Laws, § 593.

A replevin action is purely possessory; and a recovery of the property therein, under a chattel mortgage, settles nothing but the mere right of possession. The record in the case at bar shows that the question of damages for breach of contract and of warranty in the replevin action was withdrawn from the jury by the court, except to prevent a recovery therein. If the defendants in the replevin action had prevailed, would it be contended that they are estopped from a recovery of further damages?

The defendants below alleged in their said fourth defense of their answer, and the court so held, that because the jury in the replevin action assessed the value of the special interest of the plaintiffs in that action under their chattel mortgage at $250 less than the amount of their two notes with interest computed thereon, secured by said mortgage, the jury must have fully passed on the question of damages. Hence, only by argument—that the defendants in error recovered possession of the property in the replevin action—can it be urged that the question of plaintiffs' damages is *res judicata*. This is not the law as laid down by the above authorities.

1 Smith's Leading Cases (6th ed.), 592, 596.

The jury in the replevin action may have found a verdict in favor of the defendants below without considering the question of damages.

Burton v. Shaw, 14 Gray, 433, 439.
Wood v. Jackson, 8 Wend. 107.
Ackin v. Peck, 22 Vt. 255.
Smith v. Weeks, 26 Barb. 463.
Ridgley v. Stilwell, 27 Mo. 128.
Washington Steam Packing Co. v. Sickles, 24 How. 333.
Lawrence v. Hunt, 10 Wend. 88.
Norton v. Huxly, 13 Gray, 285.
Finley v. Hanbest, 6 Casey, 190.

The fact that the defendants in the replevin action set up specially breaches of contract and of warranty, and asked damages therefor, did not entitle them to any affirmative relief, or any relief. The same evidence was admissible for the defendants below under the general denial of their answer in said replevin action. It is only the matter upon which the plaintiffs prevailed in their replevin action, to wit, the possession of the property under the chattel mortgage, that was in issue.

2 Smith's Leading Cases (6th ed.), 814.
Bailey v. Bayne, 20 Kas. 657.
White v. Gemeny, 47 Kas. 741.

Whether the action of the plaintiffs in error is necessarily barred by the result of the replevin action, would seem to depend upon whether, if both actions had been brought simultaneously, one could have been pleaded in abatement of the other; for, if it could not, they cannot be regarded as absolutely identical in law.

2 Smith's Leading Cases (6th ed.), 801.

All of which is respectfully submitted.

A. B. JETMORE,
A. P. JETMORE,
Counsel for Plaintiffs in Error.

147 U.S. 467
111

Office Supreme Court U. S.
FILED.
OCT 22 1892
JAMES H. McKENNEY,
CLERK.

—IN THE—

Supreme Court of the United States,

October Term 1892.

No. 13,665.

W. P. CLEMENT, M. B. CLEMENT, and CHARLES EUSTICE, partners, doing business as CLEMENT, EUSTIS & COMPANY, *Plaintiffs in Error.*

vs.

JAMES A. FIELD and ALEXANDER MAGEE, partners, doing business as J. A. FIELD & COMPANY,
Defendants in Error.

Statement and Brief for Defendants in Error.

SUBSTANCE OF PLEADINGS.

The petition averred, in substance, that on the 22d day of June, 1883, plaintiffs were engaged in raising sorghum cane and the manufacture of sugar and molasses from such cane near Sterling, Rice County, Kansas; and defendants were engaged in the manufacture of mills for the purpose of making sugar and molasses from such sorghum cane; that on said date plaintiffs employed defendants to manufacture a No. 7 Star Cane Mill, the main roller to be 24 inches and the lower roller 20 inches in diameter and three feet long; including bagasse carrier 16 feet long, complete; reels, drawing-chain, fifty feet of carrier-webb, with friction-rollers for a fifty feet cane-carrier, gearing to give speed of 25 feet per minute to cane traveling through rollers, engine making 100 revolutions per minute, with double-back gearing suitable to attach direct to engine-shaft, to be delivered on board the cars in the city of St. Louis, State of Missouri, on or before the 1st day of August, 1883, for which plaintiffs agreed to pay defendants $1850.00; $500.00 cash in hand; $500.00 due November 1st, 1883; $850.00 due November 4th, 1884, with interest at 6 per cent per annum on the last payment from the date of shipment of said mill from St. Louis. Both of said deferred payments were evidenced by promissory notes given by plaintiffs to defendants, secured by chattle mortgage on said mill.

That the defendants at the time of the sale of the mill falsely and fraudulently warranted that it would do as good work as any other mill for a similar purpose, and that it would crush and press the juice as thoroughly from the cane as any other mill of its size and price, and that it should be of good material and well made, and do as good and as much work as any mill of any other factory; and to be as strong as any other mill of its size; and that defendants would stand by and make said mill good in all respects as warranted, and upon failure of said mill to perform as warranted, upon notice

the defendants would make it operate and perform in accordance with said warranty, and failing so to do, defendants would at their own cost and expense replace it with a new one that would perform as warranted, or refund the purchase-money.

That plaintiffs perform all and singular the conditions of said contract on their part; that they paid defendants the $500.00 cash payment, and executed and delivered the notes secured by the chattel mortgage on said mill as agreed by the terms of said contract.

That defendants failed, neglected and refused to perform their part of said contract in these particulars:

1st. They did not manufacture and ship said mill at the City of St. Louis on or before August 1st, 1883, nor until August 15th, 1883, thereby depriving plaintiffs of its use for fifteen days.

2d. That the mill did not do as good work as any mill for similar purposes, but failed to perform the purpose for which plaintiffs bought it and defendants sold it; that it did not crush and press the juice as thoroughly as any other mill of the same size and price; but, on the contrary, failed to crush the cane and press the juice therefrom, which ought and could have been pressed from such cane if the mill had performed as it was warranted to do. That the mill was not constructed of good material, or well made; that it would not do good work, or as much of it as any mill of other manufacture, but failed in these respects; that it was not strong as any other mill of the same size, but was weak and unfit for use; that it was not as good as any other mill made, but was worthless and of no value whatever, and that said defendants did not make said mill good after such failure, but on the contrary they neglected and refused to make it operate and perform in accordance with the warranty, and neglected and refused to replace it with a new one at their own cost and expense that would perform the warranty, and this after having been notified and requested so to do. That defendants, though reques-

ted, have failed to refund to plaintiffs the purchase money paid upon said mill.

That defendants, by means aforesaid, "falsely and fraudulently deceived plaintiffs in the sale of the mill, and in the making of the contract; that defendants, confiding in such false and fraudulent misrepresentations and warranty, took possession of and operated the mill for the purpose of manufacturing sugar, syrup, molasses during the season of 1883, and that said mill, through its being so defectively and unmechanically constructed as aforesaid, failed to perform the uses for which defendant sold it to plaintiffs; thereby plaintiffs incurred losses and expenses in and about repairs on said mill to induce it to operate, to wit, $300.00. That said mill not having been manufactured and shipped on the 1st day of August, 1883, as agreed, plaintiffs were deprived of the use thereof fifteen days, thereby delaying plaintiffs in operating it, and depriving them of their large profits and gains, to wit, $1500.00, which they otherwise would have made from the earnings of the mill; and also thereby forcing plaintiffs to lay out and expend large sums of money, to wit, $500 in and about procuring it to operate and perform the uses for which it was sold by defendants and purchased by plaintiffs, thereby delaying plaintiffs and hindering in operating said mill and manufacturing sugar and molasses. Plaintiffs' damages $2000.00."

THE ANSWER

Contained a general denial, and several special defenses, the fourth of which read as follows:

"4th. That under and by virtue of the terms and conditions of the chattel mortgage given to secure the payment of two (2) notes of $850.00 and $500.00 respectively and the interest thereon mentioned in said plaintiffs' petition, the said defendants on the 1st day of October, 1884, became and were entitled to the immediate posses-

sion of said mill and appliances; and that afterwards on the second day of October, 1884, the said defendants brought an action in replevin against the said plaintiffs in the circuit court of the United States for the district of Kansas to recover the possession of said mill and appliances, alleging that they were entitled to the possession thereof by virtue of said chattel mortgage, and the breach of the conditions thereof, and alleging that their interest in said mill and appliances was the amount of said two notes of $850.00 and $500.00 respectively and the interest thereon, amounting then in the aggregate to the sum of about $1,450.00; that said plaintiffs appeared in said action and filed their answer therein, alleging that the said defendants had no interest in said mill, and that nothing was due on account of said notes for the reason that said defendants were indebted to them in damages for and on account of the matters and things set out in the petition herein, and as the cause of action sued upon herein —in a sum greater than the amount of said notes and interest and asking to have damages set off against said notes and interest, and that they might have judgment for the balance; that said action of replevin was duly tried upon its merits and before said court and a jury, and a verdict returned therein by the jury finding that at the time of the commencement of said replevin action, the said plaintiffs were entitled to the possession of said mill and appliances, and that at said time the value of their interest therein was $1,151.20, and that afterwards and on the 19th day June, 1885, a judgment was duly rendered upon said verdict, and in accordance therewith by reason whereof said plaintiffs have had a former recovery against the said defendants upon the cause of action set out in the petition and sued on herein for the sum of $250.00. Record p. 14.

THE REPLY

Contained a general denial, and also confessions and avoidances, among which were the following:

"4th. Plaintiffs admit that the defendants brought an action in replevin in the United States Circuit Court for the district of Kansas, to recover the posession of said mill and appurtenances under a chattel mortgage, as averred in the fourth count of their said answer; plaintiffs also admit that they appeared to said action and set up the defense to said action as therein alleged, but plaintiffs aver the facts to be, after they set up their said defense claiming damages for the breach of said warranty and said contract set out in plaintiffs' petition herein, and sought to recover judgement thereon for their damages by them sustained under the breaches of said contract and warranty therein contained, and which said defense was, upon the defendants' motion to said court, ruled out from the record of said court, and the plaintiffs were not permitted to make said defense nor recover their damages in said suit of replevin, and that said court held, and so stated in open court, that said action in replevin was purely a possessory action, and that said plaintiffs, as defendants therein, could not recover for any damages they may have sustained in consequence of the breaches of said warranties, and that the only way which they could recover redress therefor would be by an action by them brought upon said contract therefor in damages, wherefore said damages were not adjusted in said replevin action nor adjudicated therein, nor did, nor could plaintiffs recover any damages therein in $250.00 or any other sum, nor was plaintiffs' cause of action herein adjudicated in said action." Record pp. 23 and 24.

Parties by written stipulation having waived a jury, the case was tried to the Court, Dec. 7th, 1887, on the fourth defense set up in defendants' answer as above quoted, and that part of the reply above quoted.

Defendants to sustain their plea of *res judicata* read in evidence the original papers and files, consisting of petition and *precipe*, affidavit for replevin and bond, the amended answer and the amended reply, *the instruc-*

tions of the court, the judgment, motion for new trial, and the decision of the Court in overruling motion for new trial, in the replevin action, case No. 4812, filed and begun October 2d, 1884, in the Circuit Court of the United State for the District of Kansas, wherein James A. Field and Alexander Magee, partners, doing business under the firm-name and style of J. A. Field & Company were plaintiffs, and W. P. Clement, M. B. Clement, and Charles Eustis, doing business under the firm-name of Clement, Eustis & Company, were defendants with the endorsements upon said papers.

The trial in the replevin case was concluded June 19th, 1885.

THE COURT CHARGED THE JURY AS FOLLOWS:

"The controversy in this case is about the right of possession of the cane mill in question.

"The plaintiffs, Field & Co., claim the right of possession under the chattel mortgage given by the defendants, Clement & Co., to secure the balance of the purchase-money.

"The mortgage provided that if the defendants made default in the payment of the money or any part thereof when it became due, then the plaintiffs should have the right to take possession of the mill and sell the same to pay their debt.

"The $500.00 note which fell due November 1st, 1883, was not paid, and the plaintiffs demanded the mill, and on defendants' refusing to give it up plaintiffs commenced this suit in replevin for the property.

"The defendants in effect deny that they are in default. They do not claim that they actually paid the $500 note, *but they claim that by reason of the breach of the contract, sale, and warranty of the mill by Field & Co., that the defendants sustained damages sufficient to cover and cancel their debt on the property.*

"This presents the main question for your consideration, *i. e.:* Was there a breach of the contract by Field & Co.?

"The warranty of the machine, or the part material to this case, reads as follows:

'*Subject to the following Warranty:*

'We warrant the Star cane mill and evaporator, centrifugals, and bagasse burners to do as good work as any other mill or evaporator, centrifugals, and bagasse burners, for a similar purpose, and to crush and express as fast or evaporate the juice as thoroughly as any other mill or evaporator of the same size and price, to swing out the malado or burn bagasse as well, and to be of good material and well made. If the mill or evaporator or other articles named fail to operate as above, immediate notice must be given to us or to our agent who sold it, and time sufficient allowed to send some one from the factory to operate it. If the mill or evaporator fails then to perform as above-described, it will be taken back and a new one furnished that will perform as warranted, free of costs or expense to the purchaser or the money refunded. If, however, it is found that the fault was in consequence of the mill, or evaporator, or other articles not having been operated according to directions, and from no fault in the mill or evaporator or other articles, then the purchaser shall pay the traveling expenses of the party sent to operate it, and the machine shall be considered as filling the warranty. It is hereby further agreed that one day shall be deemed sufficient for a trial, and if the mill or evaporator or other articles fail to perform as warranted, the purchaser shall be obliged to give notice at once. The absence of any information after said trial, shall be conclusive evidence that the mill or evaporator is accepted; no mill or evaporator to be returned until the conditions of the warranty are fully complied with.'

"Modified by the following letter of J. A. Field & Co. to defendants:

'St. Louis, Mo., June 25th, 1883.

'W. P. Clement, Sterling, Kansas:

'Yours of the 23d received and noted. When I read a part of our printed warranties to you I had no thought of concealing or misleading you. We do not expect to take advantage of any technical wording in the warrantee, and should not expect to confine the limits of the warrantee to one day's use. Those items in warrantee were intended for small mills in the hands of strangers who have no experience, and were for a protection against unprincipled persons who are ready to take advantage of anything necessary, and throw mills back on our hands without notice, after they have their work done.

'You can consider the warranty so modified as to cover the fact that it is warranted to do as good work and as much of it as any mill of any other manufactory, and to be as strong as any other mill of same size. If it would be necessary to send a man to your place for any reason, we would not be liable to ask you to pay our bill of expense. We understand we are dealing with experienced men, and we shall not have to look after the mill unless in case of defect, and that will be at our expense.

'You shall have as good a mill as any one makes, and we will stand by it. We can't afford to do anything else.

'Yours,

'J. A. Field & Co.'

"This is the contract between these parties as to the quality and capability of the mill. The plaintiffs were to ship the mill at St. Louis by the 1st day of August.

"The law in general permits parties to make their own contracts, and each party is bound to perform his contract unless released or prevented by the other party, and for a failure to do so must respond in damages.

"The plaintiffs did not ship the mill until August 14th, but they say the reason for that delay was that defend-

ants failed to make the cash payment of $500 at the time agreed on. Now, the plaintiffs were not bound under the contract to commence work on the mill until that payment was made, and whatever time they lost by that delay of payment, if it delayed the making of the mill, should be added to their time for shipment.

"There seems to have been some delay in getting the mill set up after it arrived at Sterling. There seems to have been some fault in the papers, which took a little time to correct, but does not seem to have been the fault of the plaintiffs.

"There was also about three days' delay in starting the mill for the want of a proper shaft. The shaft sent from St. Louis with the mill was too short. There is a controversy as to who is to blame for that mistake. Each party charges default on the other party, and you must decide it. If it was the plaintiffs' fault they should pay the damages for that delay; if it was not their fault they should not pay it.

"From and after the middle of August time was valuable to the defendants, as their cane was ready to work, and if they were delayed in commencing their work by default of plaintiffs in not shipping the mill and proper appurtenances, of course the plaintiffs must make it good to them.

"But, if the defendants accepted the shipment of August 14th, without objection or claim for damages and gave plaintiffs to understand that they accepted it as a sufficient compliance as to the date of the shipment, the defendants cannot now come in and set up damages for that delay.

"So much as to the claim for damages for delay.

"The next question is the great bone of contention: Should these plaintiffs be charged with damages on a breach of their warranty?

"The guarantee provided, 'If the mill fails,' &c.

"Now, under the contract, the defendants were re-

quired to give plaintiffs immediate notice of any failure of the mill to do good work, and plaintiffs were to have time to send some one from their factory to operate it, so you will see that plaintiffs were not put in fault until after the notice from the defendants.

"It appears from plaintiffs' letter that they did not mean to confine the defendants to a test of the mill for one day, but they were to have some more time. Just how much more is not clear from the evidence, but Mr. Field says four or five days and Mr. Clement denies any specific time.

"But, be that as it may, the plaintiffs were not in fault until they were notified of trouble about the mill. Indeed, they had good reason to believe, from the defendants' letter of August 31st and September 7th, the last letter written eight days after starting the mill, that it was giving good satisfaction and really they could rest easy until a contrary report was received by them. It seems that they received a telegram from defendants August 19th saying, Send new scraper and man to adjust it; mill standing idle, or words to that effect. Now, this telegram did not contradict the favorable report of September 7th; but might well lead them to believe the mill had stopped by reason of the broken scraper; and not until about the 25th of September did plaintiffs receive information of dissatisfaction with the operation of the mill, and that came by letter in the hands of Haener, who had gone out to put in the scraper.

"On the 25th of September the plaintiffs wrote, in answer to that letter, that their warranty had been made good, and whatever they *done* after that to make the mill work was a matter of grace and not a legal obligation.

"And, in consideration of the lapse of time and the former good report by the defendants about the mill, the plaintiffs' position has much force and reason in it, and I am not sure but it is my duty to say to you, as a question of law, that defendants are estopped to question the

warranty after those occurances and lapse of time; but as there was some further time given by plaintiffs' letter, and that is not very definite, I will leave it to determine if this notice could be said to have been given the plaintiffs within a reasonable time. If it was not, defendants cannot question the warranty or claim damages for its breach, and it is in such case immaterial whether the mill worked well or otherwise.

"But you will find that notice was in time. These plaintiffs were to have time to send a man out from St. Louis and a reasonable time after he arrived there to operate the mill and cure any defect in its operation, and if it was made to run properly in a reasonable time thereafter it was a compliance with the warranty and plaintiffs would not be liable for damages in that respect.

"Whatever may have been the fault or difficulties, whether in the mill or the foundation, it is agreed that it got to doing satifactory work by the 10th of October; so the only period of time in any event that you have to consider in connection with the plaintiffs' liability for damages on the warranty lies somewhere between Sep. 25th and Oct. 10th, and out of that period the plaintiffs were to be allowed time to send a man out—reasonable time for him to get the mill in operation. If you find the notice was in time, and after making such allowance there was left some days in which the mill failed to do good work through the fault of the mill itself and not the foundation or the persons operating the same, then you are to consider and determine what damages the defendants sustained by reason thereof and charge the plaintiffs with such damages.

"If, however, the trouble arose from the fault of the construction, or the material of the foundation, or the fault of the defendants' employees in operating the mill, and not in the mill itself, then plaintiffs would not be liable for the damages."

RULE FOR DAMAGES.

"The defendants' damages would be, if entitled to damages, the whole of the cane lost by the delay cause by plaintiffs' fault and failure of the mill to work up to its capacity, and also the loss of juice during that time caused by the fault of the mill in not properly pressing it from the cane, and any expenses incurred in repairs, etc.

"And should you find damages for defendants, and that such damages equaled or exceeded the entire debt due on the mill, then you will find for the defendants. If you find damages, but they do not equal plaintiffs' debt, then you will find for plaintiffs and state the value of plaintiffs' interest in the mill, which would be their debt, and interest, less the damages.

"Burden of proof of a breach of warranty on defend. ants."

Record pp. 41–45.

The jury returned a verdict as follows:

"J. A. FIELD & Co.
vs.
CLEMENT, EUSTIS & Co. } 4812.

"We, the jury in said entitled action, find for the plaintiffs that at the time of the commencement of this action the said defendants did wrongfully detain the goods and chattels in the plaintiffs' petition described from the plaintiffs, and that said property was at that time of the value of $1,200.00, and also that the value of the plaintiffs' special interest therein at that time was the sum of $1,151.20.

"CHAS. A. WRIGHT, Foreman."

Record p. 45.

On the above verdict, the Court rendered judgment as follows:

"It is therefore considered, ordered, and adjudged by the court that the said plaintiffs do have the possession

of the specific personal property in said petition mentioned and described, to-wit: one Star Cane Mill No. 7; main roll 24 inches in diameter; lower rollers 20 inches clear in diameter; all rolls three (3) feet long, including double-gearing cane-carriers, and bagasse carriers, complete; said mill was made by J. A. Field & Co., St. Louis, and that said plaintiffs do have and recover of and from said defendants the possession of said specific personal property, and that the said defendants do deliver to said plaintiffs said specific personal property, the same being now in the possession of said defendants.

"And it is further considered, ordered and adjudged by the court that in case a delivery of said specific personal property cannot be had that said plaintiffs do have and recover of and from the said defendants the said sum of $1,151.20, the amount of said plaintiff's specific interest in said property so as aforesaid found by said verdict, and that said plaintiffs do have and recover of and from the said defendants the costs of this action, taxed at —— dollars, and hereof let execution issue."

Record p. 46.

In overruling the motion for new trial in the replevin case, the court said:

"There are two questions presented on the motion for a new trial, that under the pleadings, if urged at the time of the trial, would have had much force.

"The first is whether the failure to notice the cash payment by the defendants at the time named in the order for the mill is so pleaded in the plaintiff's reply as to entitle them to avail themselves of it as an excuse for the delay in making and shipping the mill.

"The answer of the defendants avers that they 'performed all and singular the conditions of their part.' The plaintiffs in their reply have a general denial, and also special averments, &c. Now, it is a close and somewhat doubtful question whether the general denial in the reply entitled plaintiffs to offer that evidence.

"But the question was not presented on the trial, and the evidence went in without objection, and it is now too late to make the objection.

"The other question is the instruction to the jury that unless the defendants' damages equaled or exceeded the whole debt of the plaintiffs that they should find the right of possession of the property in the plaintiffs with the statement of amount due. As the action was commenced before the $850.00 note was due, this instruction was not correct, but it was not challenged at the time; and inasmuch as the large note was long past due at the time of the trial, while the court saw the difficulty, it rather assumed that the defendants would prefer to have the whole controversy determined in that action, rather than on a somewhat technical point necessitate the probability of another contest over the other note.

"But it seems to me that from the evidence it was an error that did not prejudice the defendants, for on making computation of the amount of the large note and all interest thereon, it falls short of the verdict about $200, showing clearly that the jury fixed defendants' damages as lacking about that sum of cancelling the $500 note.

"As the court told the jury, the main controversy was about the merits and demerits of the mill as constructed; whether it filled the plaintiffs' warranty. The case was thoroughly tried on both sides and a great deal of expert and other testimony offered. The question of damages for a few days' delay, more or less, as also the question of plaintiffs' right to bring in his whole debt or only the $500 note, was overshadowed by the main controversy, and it seems to me the verdict is a fair and just one under all the evidence and that no good can come to either party by going over this controversy again. The motion is overruled."

Record pp. 47 and 48.

The papers above quoted, as well as the petition, answer and reply, and the filing of the papers were put in evidence in the case at bar; and in addition thereto the

defendants herein proved by overwhelming testimony the following facts:

That the mill and property sought to be replevined in said case No. 4812 was the same mill and property mentioned in the plaintiffs' petition herein; that the notes and chattel mortgage set out in the petition in said case No. 4812 are the same notes and mortgage mentioned in the petition herein; that the causes of action and claims for damages sued for in this action are the same causes of action and claims for damages that were set up in the answer in said case No. 4812; that the said case No. 4812 was tried upon its merits and sumitted to a jury upon the evidence and instructions of the court; that upon the trial of said case No. 4812, after the plaintiffs had introduced the said notes and chattel mortgage and shown a *prima facie* right to recover in said action, the defendants in said action introduced a large amount of evidence tending to establish their said claims for damages set up in said answer; which evidence was admitted by the court and allowed to go to the jury over the objection of said plaintiffs, the court holding that the said defendants were entitled to offset the amount of said notes and interest thereon offered in evidence to secure which the said chattel mortgage was given by any damages set up in their said answer which they could establish, but would not be entitled to a judgement over against said plaintiffs in case the jury would find that the said damages exceed the amount of the said notes and interest; but in case said damages equaled or exceeded the amount of said notes and interest, then said defendants would be entitled to a judgement against said plaintiffs for costs, but no more, and the court also so instructed the jury, as appears from the instructions of the court to the jury herein set out; that after said defendants had introduced said evidence, tending to establish their said damages, said plaintiffs introduced a large amount of evidence tending to disprove said damages; that the evidence upon said claims for damages was the only evidence in-

troduced by said defendants in said action tending in any way to show that the value of said plaintiffs special interest in the property, to recover which said action was brought, was not equal to the amount of the said notes and interest set out in the petition in said action; that no evidence offered by said defendants tending to establish said claims for damages or the amount thereof was ruled out by the court or excluded from the jury because of said ruling of said court that said defendants would not be entitled to a judgement against said plaintiffs for the balance over in case the jury found that the said damages exceed the amount of the said notes and interest; but said question of damages was tried and submitted to the jury and determined as herein stated; and, further, that the plaintiffs in this action were the defendants in the said case No. 4812, and that the defendants in this action were the plaintiffs in said case No. 4812.

The above was all the evidence offered in the case by either party on said plea or fourth defense of defendants herein, and was all the evidence introduced by either of the parties herein.

Whereupon the court, after hearing argument of counsel and being fully advised in the premises, doth find for the defendants, and that the plaintiffs have had a former recovery against the defendants herein upon the cause of action set out and tried in the aforesaid action of replevin, and that the proceedings and judgment therein are a complete bar to the plaintiffs' cause of action herein.

Whereupon it is considered by the Court that the defendants have and recover of and from the plaintiffs their costs in this behalf laid out and expended, taxed at $——, and hereof have execution; to which action and decision of the court the plaintiffs at the time duly excepted and except.

Record pp. 48 and 49.

POINTS AND AUTHORITIES.

I.

A judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit, between the same parties, or their privies, upon the same cause of action, so long as it remains unreversed.

Packet Co. vs. Sickels, 5 Wall, 580.

Belrit vs. Morgan, 7 Wall, 619.

Cromwell vs. Sac Co., 94 U. S., 351.

Davis vs. Brown, 94 U. S., 423.

County of Franklin vs. German Savings Bank, 142 U. S., 93.

Kerrison vs. Stewart, 93 U. S., 153.

Shaw vs. Little Rock & F. S. R. Co., 100; U. S., 605.

Richter vs. Jerome, 123 U. S., 233.

Foye vs. Patch, 132 Mass., 105.

Hanna vs. Reed, 102 Ill., 506.

Jones vs. Commercial Bank, 78 Ky., 413.

II.

Compiled Laws of Kansas, 1885, Chapter 80, entitled Procedure—Civil—among other things provide:

SEC. 2. The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its object, and assist the parties in obtaining justice.

SEC. 10. The distinction between actions at law and suits in equity, and forms of all such actions and suits heretofore existing are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action.

SEC. 94. The defendant may set forth in his answer

as many grounds of defense, counter-claims, set-off, and other relief, as he may have, whether they be such as have been heretofore denominated legal or equitable, or both.

Under these sections of the Kansas laws the following proposition is settled by the Supreme Court of that State, to-wit:

The defendants in an action of replevin, brought by plaintiffs to enforce a special lien against property covered by chattel mortgage given to secure part of the purchase-money, may, when plaintiffs sold said property with a warranty to defendants, if there has been a breach of said warranty, plead the same as a set-off, and recoup damages in reduction of plaintiffs' special claim upon such property; and if such damages equal plaintiffs' claim it will defeat their recovery.

Gardner vs. Risher, 35 Kan., 93.
Jones on Chattel Mortgages, Sec. 706.
Cobbey on Replevin, Sec. 709.
Bloodworth vs. Stevens, 51 Miss., 475.
Workman vs. Warder, 28 M. A., 6.
Babb vs. Talcott, 47 Mo., 343.
Hinman vs. Judson, 13 Barb, 629.
Lindley vs. Miller, 67 Ill., 248.
Peck vs. Brewer, 48 Ill., 55.
Turner vs. Retter, 58 Ill., 265.
Streeter vs. Streeter, 43 Ill., 155.

In Gardner vs Risher, 35 Kan., 93, it is *held*: Unliquidated damages arising from contract may constitute a set-off against a note secured by a chattel mortgage, and if such unliquidated damages exceed the mortgage debt, the mortgagee is not entitled to the possession of the property described in the mortgage, as against the mortgagor asserting such unliquidated damages and plead-

ing the same in an action founded upon the note and mortgage. The court says:

"The $61.68 which Risher had paid upon the notes secured by the mortgage, together with the $85.00 claimed by him as a damage by reason of the breach of the contract upon the part of Litzkie, greatly exceeded the balance due upon the notes and mortgage. The question in the case therefore is, whether Risher had the right to off-set against the notes and mortgage the damage he claimed against Litzkie. We think he had the right to off-set his damages, and that Litzkie acted at his peril in taking the cow. The only claim he had to the cow was under the mortgage, and his interest in the property depended upon the amount due him from the mortgagor, after deducing all payments and legal offsets. His claim, therefore, was founded on contract, and in this State a cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, constitutes a set-off against any action founded on contract. (Civil Code, 94, 98; Stevens vs. Able, 15 Kan., 584). The law relating to set-offs in this State has been broadened to embrace claims not recognised as such by the laws of many other States; hence, the case of Gates vs Smith, 2 Minn., 30; Keightley vs Walls, 24 Ind., 205; and Warner vs Comstock, 22 N. W. Rep., 664, do not apply."

The other cases above cited under point II., and notably Workman vs Warden, 28 Mo. Ap., 6; Babb vs Talcott, 47 Mo., 343; Hinman vs Judson, 13 Barb, 629, and Bloodworth vs Stevens, 51 Miss, 475, are paralleled with Gardner vs Risher, 35 Kan., 93.

III.

According to all the authorities where there has been a former trial and judgment in a court having competent jurisdiction of the parties and cause of action, and that identical cause of action is subsequently sued for, the plea of *res judicata* will prevail where the following conditions concur in the two cases, to-wit:

1st, Identity in the thing sued for;

2nd, Identity of the cause of action;

3rd, Identity of the persons to the action;

4th, Identity of quality in the persons for or against, when the claim is made.

Beyond dispute all four of these identities concur in the special defense in the replevin suit and the case at bar. The identical persons in the identical capacity who are plaintiffs herein were defendants in the replevin case; and the identical persons in the identical capacity who are defendants herein were plaintiffs in the replevin suit. The counter-claim or set-off, pleaded by the defendants in the replevin case, and upon which they were allowed all to which they were entitled, is the identical thing sued for or cause of action in the case at bar. The court in the replevin case had jurisdiction and its judgment was on the merits, therefore constitutes a bar to the present suit. See authorities cited under point I.

IV.

The fourth plea in the case at bar was conclusively established by the evidence. This prevented plaintiffs' recovery upon the principle of merger.

The case as made on this plea and the reply thereto and the evidence adduced at the trial established beyond dispute, that the plaintiffs in this case set up as a defense and as a set-off in the replevin case, the breach of warranty, and claimed damages to the extent and in the same manner as here claimed in the case at bar. Under a proper charge by the court, the jury passed upon that set-off, and could have allowed defendants damages equal to the plaintiffs' special lien on the property sought to be replevied, if the defendants had been entitled to that sum. In which event plaintiffs' special claim against the property, and amount due upon the notes, would have been extinguished. The jury, however,

while finding that there was a breach of the warranty, also found that the damages resulting therefrom amounted only to $250.00. I say they so found, because the undisputed amount due plaintiffs on the $850 and $500 notes, with interest, amounted to $1,451.20, and the jury on defendants' set off, by way of recoupment, allowed defendants $250, which they deducted from plaintiffs' claim, and rendered a verdict that plaintiffs special interest in the property was the sum of $1,151.20. Final judgment was entered upon this verdict, and the same stands unreversed.

Now, according to the law, and in keeping with justice, this constituted a recovery by defendants in the replevin case (who are plaintiffs in the case at bar) upon the same cause of action which they now seek to enforce. It is submitted that such recovery constituted a merger of the cause of action, in question, and a bar against plaintiffs' maintaining this suit.

Freeman on Judgments, ch. 2, p. 180.
2 Black on Judgments, Sec. 674.
Kansas City vs. R. R. Co., 74 Mo., 477.
Schuler vs. Israel, 27 Fed. Rep., 851.
Grant vs. Burgwyn, 88 N. C., 95.
Ries vs. Rowland, 11 Fed. Rep., 661.

V.

If it be claimed by plaintiffs in error that damages by way of set-off or recoupment in the replevin case could not have been allowed defendants therein for a sum greater than the amount due on the notes, still this could not affect the legal result of the judgment in the replevin case, for obvious reasons, viz:

1st. Because the recovery sought by way of set-off, or recoupment, in the replevin case, was upon the same contract and breach thereof as in the case at bar, and only one recovery could be had upon said contract,

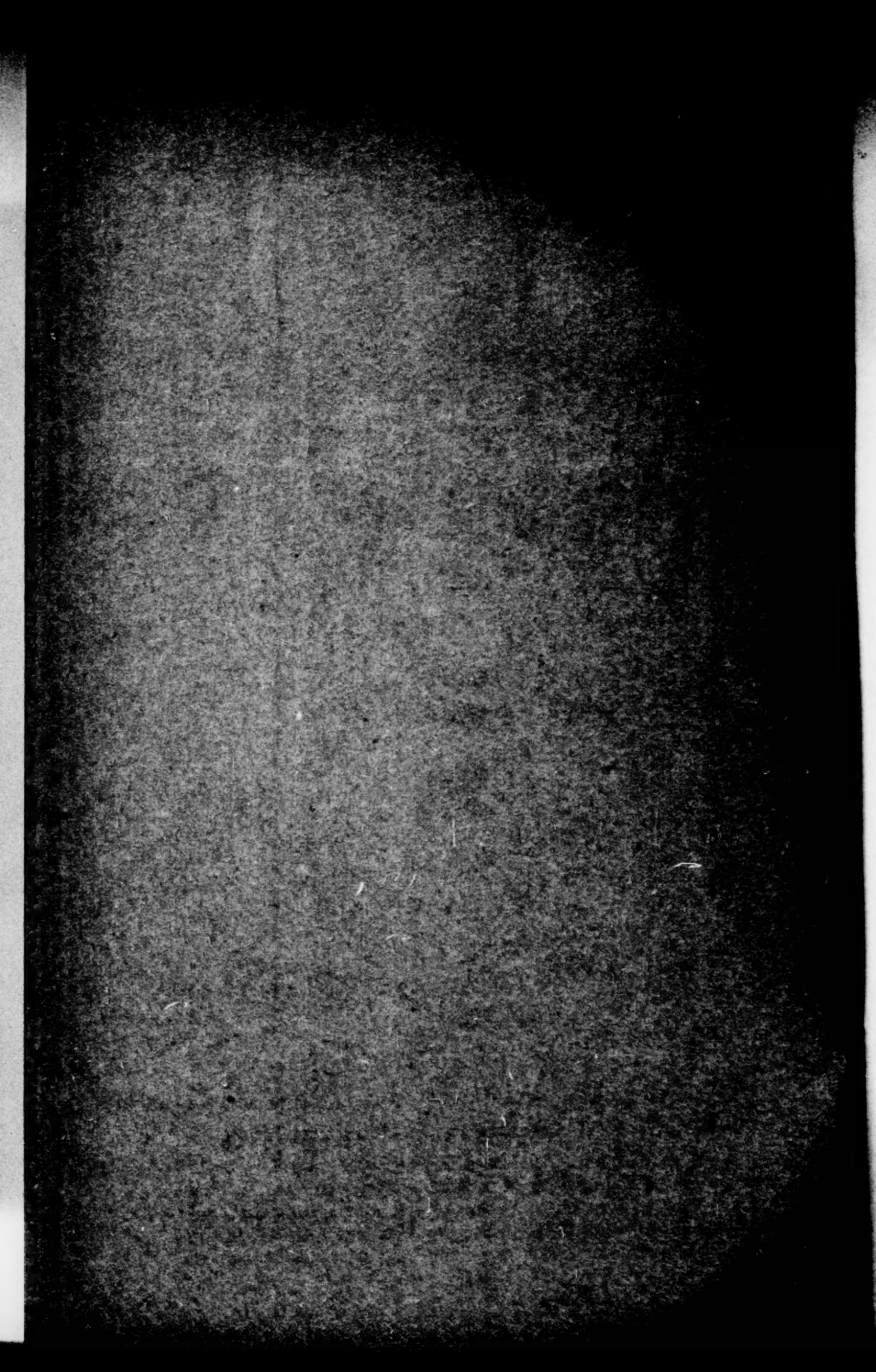
since to allow two would be to permit the splitting up of a single cause of action, in violation of a well-settled principle of law.

Warren vs. Comings, 6 Cush., 103.
Baird vs. U. S., 96 U. S. 430.
Sikes vs. Gerher, 98 Pa. St. 179.
Dutton vs. Shaw, 35 Mich., 431.
Parnell vs. Hahn, 61 Tex., 131.
Goodneh vs. Yale, 97 Mass., 15.
Orendorff vs. Utz, 48 Md., 298.
2 Black on Judgments, 734 and 735, 504, and 609.

2nd. Because as shown by the record, the jury with all the evidence before them which defendants, in the replevin case, saw fit to introduce, under a proper charge of the court, found defendants' damages to be less than the amount due upon the notes secured by the chattel mortgage, and the amount so found by the jury was taken from plaintiffs special claim against the property.

From the record it is manifest that no errors were committed by the court below; that justice was done between the parties, and it is submitted the judgment should be affirmed.

SENECA N. TAYLOR,
Attorney for Defendants in Error.



IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1892.

TERM No., 111.

W. P. CLEMENT, M. B. CLEMENT, AND CHARLES EUSTIS, PARTNERS DOING BUSINESS UNDER THE FIRM-NAME AND STYLE OF CLEMENT, EUSTIS & CO., *Plaintiffs in Error,*

vs.

J. A. FIELD AND ALEXANDER MAGEE, PARTNERS DOING BUSINESS UNDER THE FIRM-NAME AND STYLE OF J. A. FIELD & CO.,

Defendants in Error.

Case No. 13665.

REPLY BRIEF OF ARGUMENT BY PLAINTIFFS IN ERROR.

THE defendants in error, in their brief of points and authorities, at page 19, lay down the following proposition:

"The defendants in an action of replevin, brought by plaintiffs to enforce a special lien against property covered by chattel mortgage given to secure part of the purchase-money, may, when plaintiffs sold said property with a warranty to defendants, if there has been a breach of said warranty, plead the

same as a set-off, and recoup damages in reduction of plaintiffs' special claim upon such property; and if such damages equal plaintiffs' claim, it will defeat their recovery."

To sustain the above, the defendants in error specially cite and urge the case of *Gardner v. Risher*, 35 Kas. 93. That case, while it seems to partially sustain the contention of the defendants in error, it will be remembered, was decided by a divided court. Mr. Justice Johnston in that case dissented from the majority of the court, and insisted that a replevin action is in the nature of a tort, and that a set-off can only be pleaded in an action founded on contract.

That court, in the case of *Kennett v. Fickel*, 41 Kas. 211, has adopted the doctrine announced by Mr. Justice Johnston in his dissenting opinion above referred to. The court in that case lays down the following doctrine, Mr. Justice Johnston delivering the opinion of the court:

"The court ruled correctly in striking this count from the answer. The second cause of action, setting forth a set-off, cannot be pleaded as a defense in an action of replevin. Such an action is founded upon the tort or wrong of the defendant, and not upon contract; and § 98 of the code specifically provides that 'a set-off can only be pleaded in an action founded on contract.' If either of the parties named owned and had the right of possession to the property, and the plaintiff wished to rely upon that fact, he could have shown it under the general denial. *Wilson v. Fuller*, 9 Kas. 176; *Yandle v. Crane*, 13 id. 344; *Bailey v. Bayne*, 20 id. 657; *Holmberg v. Dean*, 21 id. 73."

If the defendants in error, in their citation of sections 2, 10, and 94 of chapter 80, Comp. Laws of Kansas, 1885, had included section 98, they might have saved us the necessity of further discussion. That section is as follows:

"SEC. 98. A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising on contract, or ascertained by the decision of a court."

We desire, in addition to authorities already cited in our

former brief upon the question of *res judicata*, to refer to the following:

Armel v. Layton, 33 Kas. 41, 46.
Packet Company v. Sickles, 5 Wall. 580, 592.
Waterman on Set-off and Counterclaim, sec. 530.
2 Smith's Leading Cases (6th ed.), 805.
Maxwell on Code Pleading, pp. 439, 456, 457.

All of which is respectfully submitted.

A. B. JETMORE,
A. P. JETMORE,
Counsel for Plaintiffs in Error.